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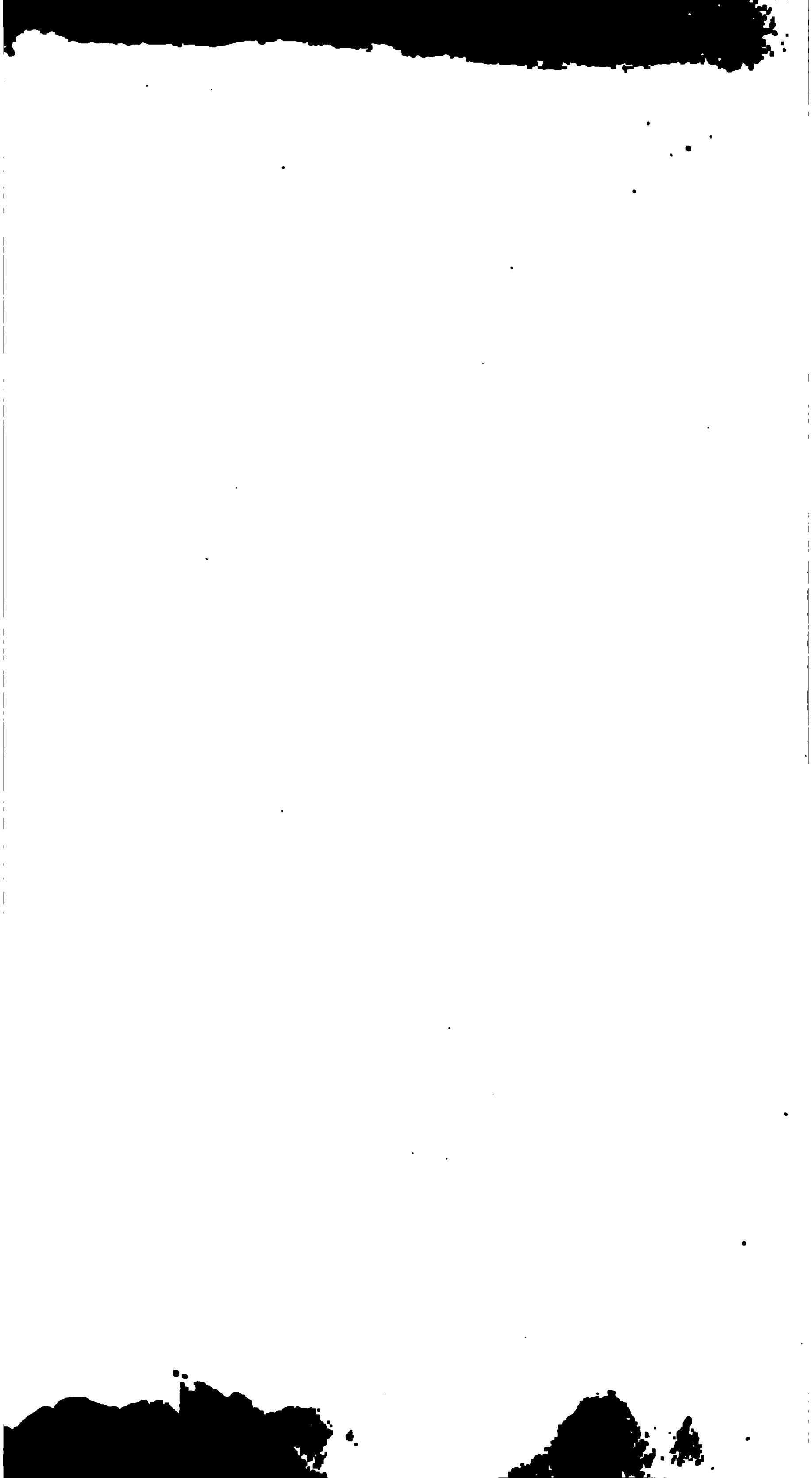
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JUDGES
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. SIR JOHN JERVIS, Knt., Lord Chief Justice.

The Hon. SIR WILLIAM HENRY MAULE, Knt.

The Hon. SIR CRESSWELL CRESSWELL, Knt.

The Hon. SIR EDWARD VAUGHAN WILLIAMS, Knt.

The Hon. SIR THOMAS NOON TALFOURD, Knt.

ATTORNEY-GENERAL.

SIR ALEXANDER JAMES EDMUND COCKBURN, Knt.

SOLICITOR-GENERAL.

SIR WILLIAM PAGE WOOD, Knt.

TABLE

OF

THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

A.			
	PAGE		PAGE
Abley v. Dale	378, 889	Burton, app., Blake, resp. . .	47
Admiralty (Commissioners of), Williams v.	420	Brooks, resp.	41
Aldis v. Mason	132	Bush, Belshaw v.	191
Arden v. Goodacre . .	367, 371, 883	Butt v. The Great Western Rail- way Company	140
Aspdin, Dorsett v. . . .	651	Butt, resp., Sheddon, app. . .	27
		Buttemer, Magnus v.	876
B.		C.	
Bagshawe, Pritchard v. . . .	459	Cambridge (Town Clerk), resp., Eaden, app.	18
Baker, Kendall v.	842	Carden, Schreger v.	851
Barnard, Howard v.	653	Carey, Heald v.	977
Beale, Crofts v.	172	Chambers, Nicoll v.	996
Beamish, app., Stoke (Overseers of), resp.	29	Charsley, resp., Daniels, app. .	739
Beardshaw v. Londesborough (Lord)	498	Clack v. Sainsbury	695
Belshaw v. Bush	191	Collingridge v. Paxton	683
Blackwood, Helsham v. . . .	111	Cooper, Blake v.	680
Blake, resp., Burton, app. . .	47	—— resp., Eaden, app. . . .	18
—— v. Cooper	680	Cornwall, Doe d., v. Matthews .	675
Blane, Grizewood v.	526, 538	Cotterell v. Jones	713
Bristol (Marquis of), Robin- son v.	208, 241	Crofts v. Beale	172
Brooks, resp., Burton, app. . .	41	Crosse v. Seaman	524

	PAGE		PAGE
D.		Great Western Railway Company,	
Dale, Abley v.	378, 889	Butt v.	140
Daniels, app., Charsley, resp.	739	———, Edwards v.	588
Dawson, resp., Pownall, app.	9	———, Parker v.	545
De Richebourg (Count), Scott v.	447	Grizewood v. Blane	526, 538
Dews v. Riley	434	Gurney, Rosetto v.	176
Doe d. Cornwall v. Matthews	675		
— d. Richards v. Lewis	1035	H.	
— d. Saxton v. Turner	896		
Dorsett v. Aspdin	651	Hamilton v. Terry	954
Dunkley v. Farris	457	Hare v. Fleay	472
		Harris v. Montgomery	393
E.		Harrison v. The Great Northern	
Eaden, app., Cooper, resp.	18	Railway Company	542, 815
East Anglian Railways Company		Hartley, Smith v.	678
v. The Eastern Counties Rail-		Heald v. Carey	977
way Company	775	Helsham v. Blackwood	111
Eastern Counties Railway Com-		Hood, resp., Pownall, app.	1
pany, The East Anglian Rail-		Howard v. Barnard	653
ways Company v.	875	Hull Glass Company, Smith v.	897
Eastern Union Railway Company,		Hutchinson v. The Surrey Con-	
White v.	875	sumers Gas-Light Association	689
Edwards v. The Great Western			
Railway Company	588	J.	
Evans, Macdonnell v.	930		
		Janes v. Whitbread	406
F.		Jarvis, app., Peele, resp.	15
Farris, Dunkley v.	457	Jones, Cotterell v.	713
Fenning, Stainbank v.	51		
Fleay, Hare v.	472	K.	
Forman v. Wright	481		
Freeman, Overton v.	867	Kendall v. Baker	842
G.		L.	
Goatly, Wickens v.	666	Lambert v. Smith	358
Goodacre, Arden v.	369, 371, 883	Leicestershire (Sheriff), Regina v.	367
Graham, Newman v.	153	Lewis, Doe d. Richards v.	1035
Great Northern Railway Com-		———, Richards v.	1035
pany, Harrison v.	542, 815	Londesborough (Lord), Beard-	
		shaw v.	498

TABLE OF CASES REPORTED.

ix

	PAGE		PAGE
London and North-Western Rail- way Company, The West London Railway Company <i>v.</i> 254, 319, 327		Paxton; Collingridge <i>v.</i> . . .	682
Lowther, Masters <i>v.</i> . . .	948	Peele, resp., Jarvis, app. . . .	15
		Perigal, Myers <i>v.</i>	90
		Perren <i>v.</i> The Monmouthshire Railway and Canal Company	855
M.		Pownall, app., Dawson, resp. . .	9
Macdonnell <i>v.</i> Evans	930	———, Hood, resp. . . .	1
Macdougall <i>v.</i> Paterson	755	Price <i>v.</i> Thomas	543
Magnus <i>v.</i> Buttemer	876	Pritchard <i>v.</i> Bagshawe	459
Marshall <i>v.</i> The York, Newcastle, and Berwick Railway Com- pany	398, 655	Promotions	496, 497
Mason, Aldis <i>v.</i>	132		
Masters <i>v.</i> Lowther	948	R.	
Matthews, Doe <i>d.</i> Cornwall <i>v.</i> .	675	Regina <i>v.</i> Leicestershire (Sheriff)	367
Memoranda	50, 496, 497	Regulæ Generales	49, 50, 814
Metcalf <i>v.</i> Richardson	1011	Richarda, Doe <i>d.</i> , <i>v.</i> Lewis . .	1035
Monmouthshire Railway and Canal Company, Perren <i>v.</i> . . .	855	——— <i>v.</i> Lewis	1035
Montgomery, Harris <i>v.</i> . . .	393	Richardson, Metcalfe <i>v.</i> . . .	1011
Morris, White <i>v.</i>	1015	——— <i>v.</i> The South-Eastern Railway Company	154
Mousley, Wheatcroft <i>v.</i> . . .	677	Rigg, Southall <i>v.</i>	481
Myers <i>v.</i> Perigal	90	Riley, Dews <i>v.</i>	434
		Robinson <i>v.</i> Bristol (Marquis of)	208, 241
N.		Rosetto <i>v.</i> Gurney	176
Newman <i>v.</i> Graham	153		
Nicoll <i>v.</i> Chambers	996	S.	
North-Western Railway Com- pany, The West London Rail- way Company <i>v.</i> 254, 319, 327		Saxton, Doe <i>d.</i> , <i>v.</i> Turner . . .	896
		Sainsbury, Clack <i>v.</i>	695
O.		Sargent, app., Wedlake, resp. .	732
Overton <i>v.</i> Freeman	867	Schreger <i>v.</i> Carden	851
		Scott <i>v.</i> De Richebourg (Count)	447
P.		Seaman, Crosse <i>v.</i>	524
Parker <i>v.</i> The Great Western Railway Company	545	Sheddon, app., Butt, resp. . .	27
Paterson, Macdougall <i>v.</i> . . .	755	Shelton <i>v.</i> Springett	452
		Sheppard <i>v.</i> Williams	682
		Shrewsbury (Town Clerk), resp., Jervis, app.	15
		Smith <i>v.</i> Hartley,	678
		——— <i>v.</i> Hull Glass Company .	897
		———, Lambert <i>v.</i>	358

TABLE

OF

CASES CITED.

Alcumia

- | | |
|--|--|
| Abley v. Dale, 437, 889 (a), 889 (b), 1064. | Ball v. Montgomery, 1047. |
| Ackworth v. Kempe, 1026. | Banfield v. Darell, 681. |
| Alexander v. Southey, 984. | Barber, Ex parte, 511. |
| Allan, app., Waterhouse, resp. 28 (a). | —— v. Backhouse, 490. |
| Allan v. Bennett, 971. | —— v. Lemon, 139. |
| Allport v. Nutt, 533. | Barcroft's case, 151. |
| Alsept v. Byles, 373. | Barnes v. Messenger, 238. |
| Alston v. Atlay, 232, 244. | Baxter, app., Brown, resp. 101. |
| Anderson v. Hampton, 376. | —— Newman, resp. 101 (b), 104. |
| Andrews v. Marris, 437, 441, 444, 445, 1026 (a). | Beck v. Beverley, 362, 363. |
| Anonymous (Cro. Elia. 163,) 244. | Bell v. Gardiner, 491. |
| —— (3 Dyer, 259, a.) 242. | Beman v. Rufford, 802, 813. |
| —— (3 Dyer, 323, a.) 243. | Benson v. Chapman, 184. |
| —— (2 Russell on Crimes, 677,) 723 (d). | Berrington v. Collis, 704, 706. |
| Archer v. English, 862 (b). | Bessey v. Windham, 1022, 1026, 1028, 1029, |
| Arden v. Goodacre, 884. | 1031, 1032, 1033, 1034, 1035. |
| Armstrong v. Normandy, 514. | Beverley v. Lincoln Gas-Light Co. 917. |
| Armytage v. Haley, 654. | Bilbie v. Lumley, 486. |
| Ashton v. Langdale (Lord), 104, 106, 108. | Bill v. Bament, 969, 970. |
| Aspdin v. Austin, 835, 837. | Bircham v. Creighton, 387. |
| Atkinson v. Davies, 483, 487. | Bird v. Astcock, 152 (a). |
| Atlas, 65, 68, 76, 77, 87. | Birkley v. Presgrave, 184. |
| Attorney-General v. Giles, 106. | Birmingham, Oxford, &c., Railway Company, |
| Atwood v. Monger, 719, 721. | in re, Ex parte Walstab, 511. |
| Augusta, 77, 89. | Bishop v. Pentland, 877, 879. |
| Austin's case, 3 (b). | Blackburn v. Mackey, 454. |
| Austyn v. Twyne, 229, 233, 242. | Blake v. Cooper, 682 (c). |
| Ayloffe v. Scrimshire, 193, 202. | Blanchet v. Foster, 1047. |
| | Bligh v. Brent, 104, 106. |
| Backwell's case, 767, 772. | Booth v. Clive, 1024, 1027, 1030. |
| Bagshaw v. Eastern Union Railway Company, | Bosanquet v. Shortridge, 789. |
| 802, 812. | Bowker v. Burdekin, 1051. |
| Baker v. Keen, 453, 454. | Boydell v. Champneys, 361. |
| —— v. Walker, 195, 484. | Boyle v. Boyle, 122. |

- Bradley v. Carr, 1018, 1025.
 — v. Copley, 1019, 1020, 1028.
 — v. Peixoto, 886 (b).
 — v. Waterhouse, 147, 149.
 Braham v. Watkins, 515.
 Bramah v. Roberts, 106.
 Brandon v. Robinson, 887.
 Branson v. Moss, 680.
 Bray v. Patrid, 727.
 Breach v. O'Brien, 154 (a).
 Bretherton v. Wood, 658.
 Brickell v. Hulse, 463.
 Bridgeman's case, 63, 71.
 Bridges v. Smyth, 451 (a).
 Briggs v. Merchant Traders' Ship, Loan, and Assurance Association, 62.
 Brisbane v. Dacres, 486.
 Brooks v. Rigby, 525.
 Broughton v. The Manchester and Salford Water Works Company, 798.
 Brown v. Chapman, 722.
 Bryant v. Clutton, 439.
 Buckeridge v. Ingram, 109 (d).
 Buckle v. Mitchell, 1051 (c).
 Burden v. Halton, 193.
 Burdon v. Flower, 447, 450.
 Buren v. Denman, 441.
 Burgess v. Gray, 870, 871.
 Burn v. Boulton, 380.
 Burrel's case, 1045, 1049, 1055, 1056, 1059, 1060, 1061.
 Bury v. Blogg, 487.
 Bush v. Steinman, 869, 870, 871, 872, 874.
 Bushell's case, 441.
 Bushell v. Miller, 984.
 Butler's case, 7 (b).

 Cadogan v. Kennett, 1052.
 Calder v. Halket, 441.
 Callander v. Howard, 451 (a).
 Camden v. Anderson, 75.
 Campbell v. Fleming, 803.
 Carpue v. The London and Brighton Railway Company, 858, 859.
 Carratt v. Marley, 438, 441.
 Caruthers v. Sydebotham, 879.
 Cary v. King, 182 (c).
 Chabot v. Morpeth (Lord), 428.
 Chamberlen v. Prescott, 724.
 Chambers v. Jones, 373.
 Chapman v. Black, 485 (d).
 — v. Emery, 1051.
 — v. Milvain, 512.
 Childs v. Monins, 173, 175.
 Christie v. Griggs, 858, 859.
 Christie v. Unwin, 671.
 Church v. Imperial Gas-Light Co. 918.
 Clark v. Woods, 438.
 Clarke v. Imperial Gas-Light Co. 787, 805.
 — v. Taylor, 129 (a).
 Clarkson v. Lawson, 129 (a).
 Clavering v. Clavering, 1051.
 Clenishaw's case, 3 (b).
 Clifton v. Hooper, 369, 373, 374.
 Cobbett v. Grey, 436.
 Cocking v. Ward, 972.
 Colman v. The Eastern Counties Railway Company, 799, 812.
 Colvill, app., Rochester (Town Clerk), resp. 3 (b).
 —, Wood, resp. 4, n.
 Connop v. Challis, 368, 369.
 Cook v. Field, 123.
 — v. Hartle, 852.
 — v. Long, 484.
 Cooke v. Stratford, 533.
 Cooper v. Harding, 442.
 — app., Harris, resp. 3 (b), 4 (a), 6.
 — v. Shepherd, 988 (a).
 Copland, app., Bartlett, resp. 38, 39.
 Coppledick v. Tansey, 235, 243.
 Corbett d. Clymer v. Nicholls, 475.
 Corrigall v. The Blackwall Railway Company, 165, 166.
 Cossart v. Lawdley, 72.
 Cotton v. King, 1047.
 Cousins v. Nantes, 78.
 Cox v. Parry, 860.
 Creswick v. Harrison, 474.
 Crofts v. Beale, 195.
 Crosse v. Seaman, 524.
 Cruise v. Clancy, 1050.
 Cumber v. Wayne, 196.
 Curling v. Flight, 109.
 — v. Long, 568.
 Custance v. Beardshaw, 103.

 Darnell v. Williams, 490.
 Davenport v. Davies, 394.
 Davies, dem., Lowndes, ten. 411 (a), 433.
 — v. Griffiths, 948.
 Davis v. Gyde, 206.
 — v. Oswell, 988 (c).
 Davy v. Warren, 645.
 Dawson v. Smith, 154 (a).
 De Beil v. Thompson, 970.
 De Medina v. Grove, 725.
 Derry v. Toll, 702, 708, 709.
 Devanoge v. Borthwick, 154 (b), 875.
 Devaux v. J'Anson, 878, 880.
 Dewhurst, app., Fielden, resp. 11.

- Dims v. Brougham* (Lord), 436.
Diggle v. Blackwall Railway Company 918.
Dobell v. Hutchinson, 971.
Doe v. Amey, 474, 476, 478.
 — *d. Garnons v. Knight*, 1046, 1051.
 — *d. Haughton v. King*, 703.
 — *d. Holcomb v. Johnson*, 675.
 — *d. Nicholl v. M'Kaeg*, 45.
 — *d. Otley v. Manning*, 416.
 — *d. Savage v. Stapleton*, 675.
Dorchester v. Webb, 193.
Douglas v. Waad, 1051, 1057.
Dover and Deal Railway Co., in re, 510.
Drake v. Shorter, 984.
Draper's case, 1052.
Duncan v. Thwaites, 869.
Dunn v. Sayles, 836, 837.

Earle v. Picken, 936 (a).
Edmonds v. Challis, 373 (b).
 — *v. Dennington*, 1047 (g).
Edwards v. The Great Western Railway Company, 572, 576, 582.
Ellen v. Topp, 320.
Elliott v. Thomas, 969.
Ely v. Moule, 437.
Emancipation, 77, 88.
England v. Bourke, 123.
 — *v. Downs*, 1052.
Evans v. Martell, 986.
Everard v. Paterson, 671.
Ewart v. Jones, 385.
Exeter, Plymouth, &c., Railway Company, in re, Ex parte Besley, 512.
Ewer v. Ambrose, 939.

Farmer v. Darling, 721.
Ferrall v. Shaen, 532.
Finch's (Sir Moyle) case, 411.
Finch v. Blount, 988.
Finucane v. Small, 148, 150, 151.
Fischer v. Aide, 863.
Fisher v. Richardson, 174 (c).
Fitzmaurice v. Sadlier, 1053.
Fivaz v. Nicholls, 723.
Fleming v. Smith, 66.
Fletcher v. Inglis, 877, 880, 881, 882.
Flight v. Booth, 1008.
 — *v. Leman*, 723.
Flounders, app., Donner, resp. 24.
Flower v. Hartopp, 1004, 1006.
Follett v. Moore, 703.
Ford v. Beech, 194, 198, 204.
 — *v. Dornford*, 387.
Forman v. Wright, 194.

Foster's case, 702 (a), 767.
Fouldes v. Willoughby, 982, 984, 985.
Fowell v. Forrest, 202.
Fox, app., Shaston St. Peter (Overseers of), resp. 4, n.
France v. Campbell, 684.
Francis v. Dodsworth, 387.
Freakley v. Fox, 201.
Fricker v. Tomlinson, 969.
Fryer v. Gildridge, 193.
Fudger's case, 6.
Furze v. Sharwood, 1013.

Gardner v. Moulton, 463.
George v. Elston, 449, 451, 452.
Gernon v. Royal Exchange Assurance, 74, 182.
Gibbons v. Vouillon, 197, 198, 202.
Gibson v. M'Carty, 124.
Gillingham v. Stuart, 418, 419.
Gladwell v. Steggall, 657, 660.
Glave v. Wentworth, 1018, 1023, 1027, 1033, 1034.
Glover v. Black, 79.
Goodright v. Hodgson, 542.
 — *v. Moses*, 1051.
Gordon v. Harper, 1019, 1020.
Goss v. Quinton, 1023, 1026, 103.
 — *v. Withers*, 182.
Gossett v. Howard, 671, 672.
Gould v. Barnes, 426.
Govett v. Radnidge, 657, 663.
Grainger v. Hill, 725.
Gratitudine, 63, 67.
Graves v. Dolphin, 368.
Gravesend Barge case, 152 (a).
Great Hale Tithes, in re, 773.
Great Northern Railway Co., v. The Eastern Counties Railway Co. 803, 813.
Gregory v. Brunswick (Duke), 447, 448, 449, 450, 451, 717, 723, 889, 891.
 — *v. Christie*, 79.
Griffiths v. Owen, 205.
Grinnell v. Wells, 719 (a).
Grocers' Company v. Canterbury (Archbishop), 229 (a).
Gully v. Exeter (Bishop), 231, 1054.

Haigh v. Brooks, 485, 486.
Hall v. Mayor of Swansea, 922.
Hammond v. Howell, 441.
Harland v. Binks, 414.
Harman v. Renew, 224, 242.
Harmer v. Steele, 201, 415.
Harper v. Philipps, 466.
Harris Fudger's case, 6.

- Harris v. Packwood**, 151 (a).
 — **v. Tippet**, 936 (b).
Hartley v. Cooke, 242.
 — **v. Cummings**, 837.
Hawkes v. Dunn, 986.
Hay v. Ayling, 487.
Haynes v. Hayton, 1022, 1026, 1032.
Hearne v. Edmunds, 879 (b).
Hearsey v. Pechell, 722 (b).
Herbert v. Champion, 491.
Hesse v. Stevenson, 341.
Hewitt v. Price, 539.
Heywood v. Collinge, 725.
Hibblewhite v. M'Morine, 531, 538, 539.
Higgs v. Mortimer, 467.
Hill v. Buckley, 1008 (a).
 — **v. Exeter (Bishop)**, 1051.
 — **v. Manchester and Salford Water-Works Company**, 787, 788, 805, 806.
 — **v. Montagu**, 532, 535, 536.
 — **v. Secretan**, 72.
Hills v. The London Assurance Company, 186.
Hilton v. Giraud, 104, 108.
Hinton v. Dibbin, 150.
Hitchins, app., Brown, resp. 24.
Hobdell v. Miller, 474, 477, 479.
Hodgson v. Hutchinson, 970.
Hogg v. Gouldney, 491.
Holdipp v. Otway, 193.
Holdsworth v. Wise, 181.
Homersham v. Wolverhampton Water-Works Company, 924, 928.
Hood v. Bradbury, 417.
Hooper v. Woolmer, 28, n., 651.
Hope v. Harman, 1045.
Houlden v. Smith, 436, 440.
Howard v. Hooker, 1046, 1052.
Howse v. Chapman, 101, 106.
Hoyles v. Blore, 363.
Hubner v. Richardson, 485 (d).
Hughes v. Buckland, 1027.
Humble v. Mitchell, 106.
Humphreys v. Griffiths, 680.
Hunt v. Bell, 126.
Hunter v. Caldwell, 466.
 — **v. King**, 374.
 — **v. Parker**, 65.
Hussey v. Christie, 74.
Hutchinson v. York, Newcastle, and Berwick Railway Company, 660.
Hutton v. Uppill, 511, 512.

India and Australia Steam-Packet Company, in re, 510.
Irving v. Manning, 180, 181 (b).
- Jackson v. Lowe**, 971.
Jacob v. Hungate, 402.
James v. Williams, 205.
Jarvis, app., Peele, resp. 1 (a).
Johnson v. Marriott, 687.
 — **v. Shippen**, 65.
 — **v. Whitcote**, 174 (d).
Jolliffe, app., Rice, resp. 13.
Jones v. Broadhurst, 194, 197, 200, 207.
 — **v. Edney**, 1009.
 — **v. Harrison**, 757, 759, 762, 768.
 — **v. Ives**, 473, 476, 477.
 — **v. Williams**, 474.
Justin v. Ballam, 72.

Kearlake v. Morgan, 193, 197.
Kemp v. Vigne, 78.
Kendrick v. Lomax, 193.
Kennaway v. Treleavan, 837.
Kent v. The Great Western Railway Company, 645.
Kerrison v. Dorrien, 1051 (c).
Kine v. Evershed, 1027.
Kingham v. Robins, 859, 862.
Kinning, Ex parte, 387, 437, 1064.
 — **v. Buchanan**, 437.
Knight v. Faith, 65, 73.
 — **v. Fox**, 870, 872, 874.
 — **v. Egerton**, 858, 861, 865.

Lake v. Billers, 1018, 1022, 1026, 1029, 1035.
Lance v. Norman, 1047.
Latham v. Spedding, 757, 762, 774.
Law v. Thompson, 395, 396.
 — **v. Wilkin**, 454.
Lawrence v. The Great Northern Railway Co., 166.
Lechmere v. Fletcher, 195.
Ledger v. Ewer, 490.
Lee, app., Hutchinson, resp. 37, 39, 40.
Lees v. Kendall, 449 (c).
 — **v. Refitt**, 449, 451, 452.
Levi v. Levi, 724.
Lewis v. Davidson, 793.
 — **v. Gompertz**, 1012.
 — **v. Mason**, 361.
Leyland v. Tancred, 852, 853, 854, 855, 858, 859, 864.
Lister v. Turner, 1051 (c).
Little v. Newton, 477.
Lloyd v. Walkey, 853.
London and North Western Railway Company v. Smith, 163.
Longridge v. Dorville, 485.
Lucena v. Craufurd, 72.

- Lockett, app., Knowles, resp. 24.
 Ladlow (Mayor, &c.) v. Charlton, 790, 919.

 Macclesfield (Mayor, &c.) v. Gee, 891.
 Macgregor v. Keily, 514.
 M'Laughlin v. Pryor, 871.
 M'Leod v. M'Ghie, 988.
 Maile v. Bays, 363.
 Maillard v. Argyll (Duke of), 193.
 Mansfield v. Maitland, 62, 65, 73, 74.
 Manley v. Shaw, 412.
 Marn v. Williams, 468.
 Manning v. Irving, 181 (a).
 Maxwell v. Thompson, 475.
 Mapes v. Sidney, 174 (b).
 March v. Attorney-General, 104, 105.
 Marsh v. Horne, 151 (a).
 Martin v. Seamore, 1051.
 Martyn v. Podger, 1018, 1026, 1029, 1035.
 Masters v. Stanley, 684.
 Matthews v. The West London Water-Works Company, 870, 872.
 Maudslay, Ex parte, 511.
 Meager v. Smyth, 860.
 Medlicott v. Hunter, 464, 467, 471.
 Mercer v. Cheese, 192, 193.
 — v. Jones, 988.
 Messenger v. Southey, 1013.
 Minet, Ex parte, 485.
 Mitford v. Mitford, 368.
 Morgan v. Birnie, 835.
 Mortimore v. Wright, 453, 454, 455.
 Moss v. Smith, 186.
 Munt v. The Shrewsbury and Chester Railway Company, 804.
 Murphy v. Bell, 78.
 Myers v. Perigal, 100 (a), 109 (a).

 Navone v. Haddon, 178, 182.
 Needham v. Fraser, 404.
 Negus v. Coulter, 110.
 Nelson, 70, 76, 84.
 Nettleton, app., Burrell, resp. 44.
 Newberry v. Colvin, 657.
 Newton, app., Crowley (Overseers of), resp. 27.
 —, app., Mobberley (Overseers of), resp. 27.
 Nias v. Davis, 764.
 Nicol v. Orgill, 672, 673, 674, 675.
 Nicolls v. Bastard, 244.
 Norfolk (Duke) v. Wortley, 1009.
 Norris v. Cottle, 511.
 Norwich (Sheriffs) v. Bradshaw, 374.

 Oakley v. Rigby, 531, 536.

 O'Connell v. The Queen, 727.
 Odinsels v. Makestoke (Prior), 227 (c).
 Ogden v. Hesketh, 1023.
 O'Neill, Ex parte, 440.
 Overton v. Harvey, 205.
 Owen v. Body, 406, 409, 410, 413, 415, 416, 417, 418, 419.

 Pallister v. The Mayor, &c., of Gravesend, 792.
 Palmer v. Gooden, 138.
 — v. Grand Junction Railway Co., 319.
 — v. Pratt, 62, 65, 73, 74.
 — v. Richards, 760.
 Pardy, Ex parte, 382, 389.
 Parker v. Carter, 1049, 1056, 1061.
 — v. Great Western Railway Co., 569, 571, 575, 579, 633, 639, 644, 647, 649.
 Parry v. Aberdeen, 186.
 Partridge v. Gardner, 451 (a).
 Payne v. Wilson, 174 (g).
 Peacock v. Bell, 671.
 Pechell v. Watson, 722.
 Peterson v. Davis, 754.
 Philanthropic Society v. Kemp, 109.
 Phillips v. Barber, 877.
 — v. Gould, 1013.
 — v. Nairne, 880.
 — v. Shervill, 887.
 Pickford v. The Grand Junction Railway Company, 570, 643, 648.
 Pickstock v. Lyster, 416.
 Piercy v. Roberts, 369.
 Pigeon v. Bruce, 680.
 Pilkington v. Scott, 837.
 Pippin v. Sheppard, 658, 664.
 Pitchford v. Davis, 511.
 Pitts, app., Smedley, resp. 15.
 Platt v. Hibbard, 151 (b).
 Poole v. Grantham, 889, 890.
 Poplewell v. Wilson, 174, 195, 484.
 Portman v. Mill, 1008.
 Poulson v. Wellington, 1047.
 Powell, app., Caswell, resp., 3.
 — v. Gudgeon, 184.
 — v. Layton, 657.
 — app., Price, resp., 11.
 — v. Sadler, 987.
 Pozzi v. Shipton, 657, 663.
 Pratt v. Hawkins, 467.
 Prescott v. Hadow, 510.
 Preston v. Jackson, 485 (d).
 Prew v. Squire, 525.
 Price v. Green, 793.
 — v. North, 1008.
 — v. Price, 193, 197, 198.

- Priestly v. Fowler, 660.
 Pugh v. Hookham, 361, 365, 366.
 Purton v. Honnor, 727.
- Quarman v. Burnett, 870.
 Queen's case, 931, 933, 934, 938, 939, 940 (a),
 941, 945, 946 (a).
- Railstone v. The York, Newcastle, and Berwick
 Railway Co., 164, 165, 166, 168, 170.
 Randall v. Morgan, 970.
 Ransford v. Copeland, 533.
 Rapson v. Cubitt, 871, 873.
 Ravenscroft v. Wise, 860.
 Rawson v. Moss, 680 (a).
 Rawstorne v. Gandell, 737.
 Rayner v. Godmond, 879.
 Reed v. Shrubsole, 889, 892.
 Reddie v. The London and North-Western Rail-
 way Company, 869, 871, 873.
 Reeves v. Lambert, 359, 360, 362.
 Regina v. Great North of England Railway
 Company, 807.
 — v. Leicestershire (Sheriff of), 884.
 — v. London and Blackwall Railway Com-
 pany, 166.
 — v. O'Connell, 931 (b).
 — v. Page and the Bishop of London, 242.
 — v. Staple Fitzpaine, 931 (c).
 — v. Tithe Commissioners, In re Great
 Hale Tithes, 773.
 Reimer v. Ringrose, 183, 188.
 Rennell v. Lincoln (Bishop), 244.
 Rex v. Barnard, 936 (b).
 — v. Bigg, 917.
 — v. Chester (Bishop), 243, 244.
 — v. Coppull, 931 (c).
 — v. Denio (Inhab.), 1054 (c).
 — v. Dewsnap, 869.
 — v. Edwards, 936 (b).
 — v. James, 936 (b).
 — v. Kilderley, 806.
 — v. Landaff (Bishop), 243, 244.
 — v. Morton (Inhab.), 1054.
 — v. Piddlehinton (Inhab.), 1054.
 — v. Rislip (Inhabitants), 123.
 — v. Rudge, 936 (c).
 — v. Salisbury, 7.
 — v. Thistlewood, 931 (d).
 — v. Watson, 936 (b), 936 (c).
 — v. Worcester (Bishop), 243, 244.
 — v. Yewin, 936 (b).
 — et Regina v. Barlow, 766.
 Reynoldson v. Blake, 225, 228, 233, 235, 242,
 251.
- Rhadamanthe, 74.
 Richardson v. Dunn, 972.
 — v. Rickman, 193 (c).
 Ridley v. Gyde, 938.
 — v. The Plymouth, &c., Grinding and
 Baking Company, 787, 922.
 Ridgeway's case, 374, 376.
 Ridout v. Bristow, 195.
 Robins, Ex parte, 319.
 Robinson v. Pierce, 684.
 Rogers v. Custance, 515.
 — v. Maylor, 491.
 Ross v. Hill, 658.
 — v. Ross, 886 (b).
 Routh v. Thompson, 78.
 Roux v. Salvador, 73, 179, 186.
 Rutter v. Chapman, 674. (a).
- Salomons v. Laing, 801, 812.
 Samsun v. Braggington, 65, 68, 74, 85, 89.
 Sandall v. Bennett, 651.
 Sarquy v. Hobson, 184.
 Saunderson v. Jackson, 971.
 Savil v. Roberts, 717, 721, 723, 724, 727.
 Saward v. Anstey, 340.
 Sayer v. Dufaur, 672, 673.
 Scarborough v. Justice Lyrius, 64 (a), 72 (a).
 Scarreborrow v. Lyrius, 64, 71.
 Schoole v. Noble, 449.
 Schreger v. Carden, 858, 860, 861, 865.
 Scot v. Bell, 1053.
 Scott v. Robson, 652.
 Shearm v. Burnard, 487.
 Sheddon, app., Butt, resp. 653 (a).
 Sheils v. Rait, 764.
 Shipton v. Thornton, 185, 189.
 Shovel (Sir Cloudesley) v. Bogan, 1907 (b).
 Shrewsbury and Birmingham Railway Company
 v. North-Western Railway Company, 804.
 Siffken v. Allnutt, 74.
 Simon v. Lloyd, 193, 197.
 Simmonds v. Hodgson, 70, 77.
 Sison v. Kidman, 173.
 Skinner v. The London, Brighton, and South
 Coast Railway Company, 657, 858, 859.
 Slatterie v. Pooley, 459, 463, 464, 936, 937 (a).
 Slegg v. Phillips, 533.
 Smith v. Hartley, 678.
 — v. Hickson, 718 (c).
 — v. Hull Glass Company, 786, 787 (b), 897,
 917, 919.
 — v. Plummer, 74.
 Snowden v. Dales, 368.
 Southall v. Rigg, 194.
 Sparling v. Parker, 104, 106, 108.

- Spencer's case, 354 (a).
 Stackwood v. Dunn, 513.
 Stafford (Mayor, &c.) v. Till, 922.
 Stapleton v. Nowell, 862.
 Startup v. Macdonald, 833.
 Stedman v. Gooch, 196.
 Stevens v. Lynch, 491.
 Steward v. Greaves, 512, 513.
 Stewart v. Alliston, 1009.
 Stiernheld v. Holden, 984.
 Still v. Booth, 382, 389.
 Stockdale v. Dunlop, 75.
 Story v. Finnis, 851, 853, 854, 855, 857, 858,
 859, 860, 861, 863, 865, 866.
 Stracey v. The Bank of England, 202.
 Strathmore (Countess) v. Bowes, 1047, 1048,
 1051.
 Stakely v. Butler, 244.
 Sturge v. Dimsdale, 110.
 Swinyard v. Bowes, 196.
 Syeds v. Haigh, 986.

 Taffe v. Downes, 441.
 Tartar, 69, 76, 77, 84.
 Tattersall v. Parkinson, 474.
 Temple v. Keily, 533.
 Thibault v. Gibson, 535, 537, 702, 707, 709.
 Thomas v. Brennan, 1052.
 Thompson v. Ingham, 386.
 ——— v. Thompson, 103.
 Thomson v. Royal Exchange Assurance Com-
 pany, 62, 63, 79.
 Thorneley v. Hebson, 178, 184.
 Thornton v. Pickering, 123.
 Thorogood v. Bryan, 148 (a).
 Tilson v. Warwick Gas-Light Company 922.
 Timothy v. Farmer, 762.
 Tollner v. Marriott, 368.
 Tomlinson v. Tomlinson, 100, 106, 107.
 Toms, app., Luckett, resp., 12.
 Trudgin's case, 767.
 Tucker v. Webster, 672, 673.
 Tufton v. Temple, 232, 235, 243.
 Tunno v. Morris, 442.
 Turquand v. Mosedon, 709 (a).
 Tynnam v. Pickard, 354.
 Twyne's case, 415, 1051.
 Tyson v. Willis, 418, 419.

 Upfall, Ex parte, 512.

 Van Wart v. Woolley, 196.
 Vertue v. Clive (Lord), 724.
 Vincent v. Cole, 923.
 Vlierboom v. Chapman, 185.

 Walker v. Collick, 464, 465, 468, 471.
 ——— v. Milne, 104, 106, 107, 108.
 ——— v. Richardson, 103.
 Walstab, Ex parte, 511.
 ——— v. Spottiswoode, 511.
 Walton v. Mascall, 196.
 Wankford v. Wankford, 193, 201.
 Warburton v. Loveland, 1045, 1056.
 Waring v. Hoggart, 1009.
 Warren v. Windle, 706 (b).
 Washbourn v. Burrows, 702, 706, 708, 709.
 Waterer v. Freeman, 720, 721.
 Watson v. Macquire, 1025.
 Webb v. Cook, 123.
 Wells v. Hopwood, 880.
 ——— v. Iggulden, 536.
 ——— v. Porter, 531.
 Wheeler v. Montefiore, 1020, 1028.
 Whittelegge v. Richards, 441.
 Wigan v. Fowler, 798.
 Wilkins v. Jones, 682.
 Williams v. Williams, 467, 468.
 Wilson v. Royal Exchange Assurance Company,
 65.
 ——— v. Van Mildert, 228, 234, 242.
 Wilton v. Scarlett, 652.
 Windon v. Kempes, 227.
 Windsor's case, 227.
 Windsor v. Canterbury (Archbishop), 237.
 Winter v. Haldeman, 74.
 Wolveridge v. Steward, 833.
 Wood v. Copper Miners' Company, 838.
 ———, app., Willesden (Overseers of), resp.,
 23.
 ——— v. Wood, 684, 686.
 Woolfe v. The City Steamboat Company, 426,
 427, 428.
 Worsley v. Wood, 835.
 Worthington v. Wigley, 206.
 Wright v. Stockport (Town-clerk of), 11, 12, 13.
 ——— v. Wilson, 1009.
 Wyld v. Pickford, 150, 660.
 Wynne v. Callander, 485 (d).

 Yrisarri v. Clement, 127.

TABLE OF STATUTES.

EDWARD I.

6, c. 1. (Statute of Gloucester.)	758, 765, 770
13, c. 1. (Westminster 2.)	368
c. 4. (Tenant in tail: forfeiture.)	767

RICHARD II.

16, c. 5. (Præmunire.)	767
----------------------------------	-----

HENRY VI.

8, c. 7. (County voter: charge upon land.)	29
23, c. 9. (Bail.)	767
27, c. 21. (Union of churches.)	224, 234, 237

HENRY VIII.

32, c. 34. (Grantee of reversion.)	354
34 & 35, c. 4, s. 1. (Bankrupt.)	767 (b)
35, c. 2. (For trial of treason beyond sea.)	702

PHILIP AND MARY.

1 & 2, c. 10. (Treason.)	702
------------------------------------	-----

ELIZABETH.

1, c. 1. (Union of churches.)	225
c. 2. (Popish recusant.)	702
13, c. 2. (Union of churches.)	225
c. 5. (Fraudulent conveyance.)	406, 1052
c. 7, s. 2. (Bankrupt.)	767 (b)
23, c. 1. (Popish recusant.)	701
sa. 5, 11. (Præmunire.)	767
27, c. 4. (Fraudulent conveyance.)	416, 1035
28 & 29, c. 6. (Præmunire.)	768
35, c. 1, s. 10. (Forfeiture.)	768
43, c. 2, s. 4. (Poor-rate.)	439
c. 6, s. 2. (Costs: certificate.)	760

CHARLES II.

14, c. 12. (Church-rate.)	766
16, c. 7. (Gaming.)	536
17, c. 3. (Union of churches.)	234
22, c. 11. (Union of parishes.)	224
(London Fire Act.)	225, 228
29, c. 3, s. 4. (Statute of frauds.)	954, 967

WILLIAM III.

7 & 8, c. 11. (Bond: assignment of breaches.)	139
c. 25. (Right to vote for member of parliament.)	37
8 & 9, c. 11, s. 2. (Costs.)	450, 891
c. 27. (Execution.)	377
9 & 10, c. 15. (Award: setting aside.)	476, 480

ANNE.

3, c. 9. (Promissory note.)	174
4 & 5, c. 16, s. 5. (Double pleading.)	450
7, c. 18. (Ecclesiastical law.)	235
9, c. 14. (Gaming.)	533, 536, 969
12, stat. 2, c. 16, s. 1. (Usurious contracts.) 699, 701, 705, 706, 707, 708, 709, 710, 711, 712, 713	

GEORGE II.

3, c. 25, s. 15. (Practice: summoning special jury.)	153
7, c. 8. (Stock-jobbing.)	531, 533, 539
9, c. 36. (Mortmain act: shares in a joint-stock bank.)	90
18, c. 18. (Right to vote for member of parliament.)	37
19, c. 37, s. 5. (Shipping: bottomry.)	69
24, c. 40, s. 2. (Tippling act.)	534

GEORGE III.

18, c. 19, s. 1. (Poor-rate: costs.)	439
22, c. 41, s. 1. (Officer of customs: disqualification of voter.)	1
28, c. 36, s. 6. (Oath of voter.)	37, 38
29, c. 18. (Right to vote for member of parliament.)	37 (b)
40, c. lxxix. (Edmonton enclosure act.)	1001
42, c. 85, s. 6. (Magistrate: protection of.)	436
43, c. 25. (Tide-waiter: disqualification of voter.)	6
43, c. 46, s. 4. (Costs: in an action upon a judgment.)	543
47, sess. 2, c. lxxviii. (Bolingbrooke and Horncastle court of requests' act.)	437 (g)
52, c. 143, s. 2. (Post-office: offences by employé of.)	7

GEORGE IV.

1, c. 119, s. 6. (Insolvent debtor: description of creditors.)	359
1 & 2, c. 93. (Commissioners of the Admiralty.)	420
5, c. lxxv. (Kensington Canal Company's act.)	280, 329
7, c. 46. (Banking copartnership.)	91
c. 46. (Joint-stock banking act.)	512
c. 57, s. 46. (Insolvent debtor: discharge.)	361
7, c. xcvi. (Kensington Canal Company's amendment act.)	280
7 & 8, c. 65. (Commissioners of the Admiralty.)	422
9, c. 31, s. 7. (Offences committed abroad.)	115
c. 60, s. 8. (Corn returns.)	848

11 GEO. IV. AND 1 W. IV.

c. 68, s. 8. (Carriers' act: felony by servants.)	147
---	-----

WILLIAM IV.

2, c. 39, s. 10. (Returns of writs to save the statute of limitations.)	459, 463, 469, 470
s. 13. (Service of process upon a corporation.)	427, 428, 432
c. 40. (Commissioners of the navy.)	423
c. 45, s. 27. (Reform act: qualification of voter.)	9
s. 32. (Reform act: freeman voter.)	15
c. 64. (Boundary act.)	16
3 & 4, c. 27. (Limitation of Actions.)	234, 243
ss. 30, 31, 34. (Quare Impedit.)	229, 230
c. xxxvi. (London and Birmingham Railway's Company's act.)	280, 292, 297
c. 42, s. 28. (Interest.)	569
s. 34. (Costs of demurrer.)	448, 450, 890, 891, 892, 893, 895
c. 65. (Commissioners of the Admiralty.)	424
c. 98. (Bank act.)	534
s. 7. (Usury: bills at three months.)	695
5 & 6, c. 76, s. 92. (Municipal corporation: bonds of.)	792
c. cvii. (Great Western Railway Company's act.)	280, 306, 545, 568
c. lxxix. (West London Railway Company's act.)	254, 292, 297, 305, 319, 321, 329, 334, 335, 236, 340, 345, 346, 352
6 & 7, c. 71, s. 56. (Tithe-commutation act: average price of corn.)	842
c. 104. (Municipal corporation act.)	792
c. cv. s. 138. (Great North of England Railway act.)	665 (a)
c. cvi. (Eastern Counties Railway act.)	792, 793, 795
c. 114. (Prisoners' counsel act.)	939
c. cxxxiii. s. 27. (Blackwall Railway act.)	165

7 WILL. IV. AND 1 VICT.

c. 3. (Commissioners of the Admiralty.)	425
c. 55. (Officers' fees.)	953
c. 78. (Municipal corporation act.)	792
c. 80. (Usury: bills at twelve months.)	695

VICTORIA

1, c. xcii. (Great Western Railway act.)	545
1 & 2, c. 45, s. 2. (Interpleader rules: costs.)	418
c. 110, s. 12. (Fl. fa.: bank-notes and money.)	683
s. 14. (Execution against land.)	110
s. 18. (Order for payment of money.)	472-480
s. 69, et seq. (Insolvent Debtor: discharge.)	358, 382, 391, 666
2 c. xxvii. (Great Western Railway act.)	588
2 & 3, c. 37. (Usury: bills at twelve months.)	659
c. xcvi. s. 22. Blackwall Railway act.)	165
3, c. xlix. Grand Junction Railway act.)	643
3 & 4, c. 24. (Lord Denman's act: certificate for costs.)	654, 760, 889, 890, 893, 895
c. 82, s. 1. (Execution against land.)	110 (c)
c. cv. (Birmingham, Bristol, and Thames Junction Railway Company's act.)	292, 307, 310, 327, 335, 337, 340, 342, 344, 345, 347, 348, 352
c. cv. (West London Railway Company's act.)	292, 296, 297, 303
c. 107. (Irish Insolvent Debtors act.)	385
4 & 5, c. 21. (Release.)	1001
5 & 6, c. 54, s. 7. (Tithes: confirmation of award.)	773
c. 97, s. 3. (Notice of action.)	589
c. 98, s. 31. (Sheriff: escape.)	867, 871
c. 116. (Insolvent: plea of discharge.)	672, 764

VICTORIA.

6 & 7, c. 18, ss. 5, 6. (County voters: list of claimants.)	22
ss. 13, 14, 15. (Borough voters: list of voters.)	23
s. 37. (County voters: list of claimants.)	22
s. 38. (Borough voters: list of voters.)	24, 25
s. 40. (Notice of claim: amendment.)	18
ss. 42, 62. (Registration appeal: statement of case, &c.)	41, 44, 653 (a)
s. 50. (Registration appeal: hearing.)	27
s. 64. (Practice: notice of appeal)	3, 11, 41, 47
s. 66. (Registration appeal: decision on, final.)	4
s. 74. (Mortgage in possession: right to vote.)	34
7 & 8, c. iii. (Great Western Railway act.)	545, 588
c. 96. (Insolvent: plea of discharge.)	672, 764
c. 110. (Joint-stock companies' registration act.)	507, 508, 511, 518, 689, 786, 787 (b), 897
8 & 9, c. 16. (Companies clauses consolidation act.)	796, 924
c. 18, s. 68. (Railway: compensation for damage: costs.)	154
c. xlviii. (Ely and Huntingdon Railway act.)	793
c. lv. (Lynn and Ely Railway act.)	793
c. 85, s. 10. Officers of customs: declaration by.)	6
c. 86, ss. 16, 18, 24, 25, 33, 34. (Customs regulation act.)	982, 984, 986 (c), 991 (a), 992
c. 102. (Usury: bills at twelve months.)	699
c. 109, s. 18. (Gaming.)	526, 538
c. cxxv. (Lynn and Dereham Railway act.)	793
c. cxxxv. (Wolverhampton Water-Works act.)	924
c. clvi. (West London Railway Company's act.)	254, 327
9 & 10, c. 95, s. 58. (Jurisdiction of county court.)	763
s. 75. (County court: evidence on trial)	736
s. 94. (County court: execution.)	1015
ss. 98, 99. (County court: discharged insolvent.)	378
s. 102. (County court: duty of clerk of.)	436, 443
s. 111. (County court: entry of proceedings.)	437, 443
s. 128. (County court: residence.)	755
ss. 128, 129. (County court: concurrent jurisdiction.)	761, 762, 765, 766, 768, 769
ss. 128, 129. (County court: costs.)	890, 892, 893, 895
s. 138. (County court: notice of action.)	1015
c. 99, s. 19. (Salvage.)	178
c. cciv. (London and North-Western Railway Company's consolidation act.)	292, 329, 331
c. ccxlii. (Newcastle and Darlington Junction Railway act.)	665 (a)
c. cccxix. (West London Railway Company's extension act.)	292, 294, 305, 306
10 & 11, c. clxx. (Lynn and Ely Railway deviation act.)	794
c. lxxi. (London small debts act.)	525 (c), 764
c. xci. (West London Railway Company's act.)	294, 337
c. clxxi. (Lynn and Wormegay navigation act.)	794
c. cclxxv. (East Anglian Railways act.)	793
11 & 12, c. 45. (Winding-up act: action against a contributory.)	498
13 & 14, c. 56. (Usury: bills at twelve months.)	701
c. 61, s. 2. (County court: construction of acts.)	757
s. 11. (Costs: debt reduced by tender below 20l.)	524
ss. 11, 12, 13. (County court: certificate for costs.)	760, 762, 765, 766, 770, 772, 773, 775 (a)
13 & 14, c. 61, s. 14. (County court: appeal.)	737, 739
s. 19. (County court: pleading.)	434, 439 (b), 440, 442, 446
15 & 16, c. 54, ss. 2, 3. (County court: appeal.)	750
(Costs.)	775 (a)
c. lxxvii. (London small debts act.)	525 (c)

YEAR-BOOKS.

3 Ann. fo. 1	718 (c)
P. 3, E. 3, fo. 19, pl. 34	718 (c)
M. 7 H. 4, fo. 31, pl. 15	718 (c)
8 H. 6, fo. 15 b, pl. 52	227
11 H. 6, fo. 33	228
H. 33 H. 6, fo. 11, pl. 17	227
M. 5 H. 7, fo. 8, pl. 17	227
T. 11 H. 7, fo. 25, pl. 7	718 (c)

RULES OF COURT.

Hilary, 2 W. 4, r. 65. (Arrest of judgment, &c.)	542
Hilary, 2 W. 4, r. 93. (Costs of issues.)	447, 448, 449, 450, 451, 452
(Pleading—illegality of consideration.)	532
Hilary, 4 W. 4, r. 7. (Practice: demurrer-books.)	28 (b), 651
Michaelmas, 16 Vict. No. 50. (Arrest of judgment.)	542 (b)

MAXIMS.

Expressio unius est exclusio alterius	766
Falsa demonstratio non nocet	231
Ignorantia facti excusat; ignorantia juris non excusat	486
Nihil facit error nominis cum de corpore constat	411
Præsentia corporis tollit errorem nominis; et veritas nominis tollit errorem demonstrationis	1005
Qui facit per alium facit per se	873
Utile per inutile non vitiatur	341
Verba fortius accipiuntur contra proferentem	309, 339
Verba generalia restringuntur ad habilitatem rei vel personæ	339, 356

DIGESTS AND ABRIDGMENTS.

Bacon, <i>Escape</i> (H.)	373
Comyns, <i>Action upon the Case for Conspiracy</i> (A.)	724
<i>Action upon the Case for a Deceit</i> (A. 4.)	724
(E. 1.)	727
<i>Admiralty</i>	63
<i>Advowson</i> (C. 1.)	231, 233, 242, 244
<i>Condition</i> (D. 4.)	369
<i>Covenant</i> (A. 2.)	834
(A. 3.)	834
<i>Fait</i> (E. 9.)	835 (a)
<i>Franchises</i> (F. 11.)	791
<i>Pleader</i> (3 L. 4.)	244
(3 L. 9.)	243
Fitzherbert, <i>Action sur le Case</i> , §	722
<i>Barre</i> , pl. 166.	194, 207
<i>Deceit</i> , 35.	720
Rolle, <i>Action sur Case</i> (H.), pl. 1	722
<i>Faits</i> (K.)	791
518.	834
Viner, <i>Advowson</i> (A.), pl. 2.	237
pl. 7.	258
<i>Contract and Agreement</i> (A.) pl. 34	970
<i>Corporations</i> (G. 4), pl. 22	427 (a)
<i>Hypothecation</i>	63
<i>Notice</i> (A. 2), pl. 10, 12	310
<i>Statutes</i> (E. 6)	702 (a), 767
<i>Voluntary Conveyance</i> (C.), pl. 3	1052

APPEALS
FROM THE DECISIONS OF REVISING BARRISTERS
UNDER 6 & 7 VICT. c. 18,
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Michaelmas Term,
IN THE
FIFTEENTH YEAR OF THE REIGN OF VICTORIA. 1851.

The Judges present at the hearing of these Appeals were—

JERVIS, C. J.

WILLIAMS, J.

MAULE, J.

TALFOURD, J.

Borough of HARWICH.

EDWARD POWNALL, Appellant; WILLIAM HOOD, Respondent.
Nov. 13.

The court will not reverse the decision of the revising barrister, without hearing the appellant's counsel, although the respondent does not appear to support it. (a)

An extra or glut tide-waiter,—one who is appointed by the collector of customs, and liable to be called upon to act as a tide-waiter whenever there may be occasion for his services, and who is paid by the job,—is an officer or person “concerned or employed in the charging, collecting, levying, or managing the customs,” within the 22 G. 3, c. 41, s. 1, and consequently disqualified as a voter.

AN objection was duly taken by Edward Pownall, to the name of William Hood being retained on the list of voters for the borough of

(a) But see Jarvis, app., Peele, Town Clerk of Shrewsbury, resp., post, p. 15.

*2] Harwich, in respect of *the occupation of property within the parish of St. Nicholas, on the ground that he had, during the qualifying year, been, and still was, one of the class of persons commonly called extra, or glut tide-waiters, and, as such, disqualified from so voting, by virtue of the statute 22 G. 3, c. 41.

It appeared, that ordinary tide-waiters are officers appointed directly by the lords commissioners of Her Majesty's treasury; and that their duty is, to board vessels entering the port, for the purpose of watching and taking charge of the cargoes until they can be examined by the proper officers of the custom; but that, there being sometimes a glut of business of that description, owing to the arrival of a great number of vessels at once, the collector of customs (who is himself an officer appointed by the lords of the treasury, on the selection and recommendation of the board of customs) is empowered, by a general authority from the said board, to keep a list of persons who are to be ready to act as occasional or extra tide-waiters, whenever the business of that department may be in excess, and who are for that reason called extra, or glut tide-waiters; that these persons are selected and nominated by the collector of customs, by virtue of the aforesaid general authority, at his own sole discretion, and that their appointment is confirmed by the board of customs, as a matter of course; that, when appointed and placed upon the said list, they are liable to be called upon to act as tide-waiters whenever there may be occasion for their services, being paid for such services by the job, according to a certain rate of remuneration, by the collector of customs, who makes a monthly report of such payments, and of the work in respect of which they were made, to the revenue department; and that extra tide-waiters make, once for all, the same declaration of office that is made by all other officers of

*3] the customs on their appointment, and, when *once placed upon the said list, they remain there until they resign, or decline to act when called upon, or are discharged for misconduct.

The said William Hood was placed upon the said list, in November, 1849, and has ever since remained thereon; and has been repeatedly employed as an extra tide-waiter during the last twelve months. The only objection to him was that above mentioned.

Being of opinion that the said William Hood was not, under the circumstances above stated, incapacitated by any law or statute from voting in the election of members to serve in parliament, the revising barrister overruled the objection, and retained his name upon the said list of voters.

Upon the appeal being called on, no counsel appeared to support the decision of the revising barrister.

Kinglake, Serjt., on behalf of the appellant, produced an affidavit of service upon the respondent of the notice of the appellant's intention to prosecute the appeal, required by the 64th section of the 6 & 7 Vict.

c. 18. [JERVIS, C. J.—The cases seem to be contradictory as to the necessity of hearing the argument under such circumstances. It certainly seems very absurd to hear an argument in support of an appeal, when the respondent does not think it worth his while to attempt to sustain the decision of the revising barrister.] In *Powell, app., Caswell, resp.*, 8 Com. B. 14 (E. C. L. R. vol. 65), 2 Lutw. Reg. Cas. 141, the decision of the revising barrister was, under precisely similar circumstances, reversed without argument. The attention of the court, however, was not drawn to some earlier cases,^(a) which are *referred to in a note to that case, where the contrary course had [*4 been pursued, and in one of which^(b) TINDAL, C. J., assigns as a reason for hearing an ex parte argument, that the grounds of appeal might turn out to be so weak, that the respondent might well think it not worth his while to incur the expense of instructing counsel to support the revising barrister's decision. A better reason, perhaps, will be found in the language of the 66th section of the 6 & 7 Vict. c. 18, which makes the decision of this Court final, and binding upon committees of the House of Commons. [MAULE, J.—The 64th section provides that no appeal shall be heard by the court in any case whereon the respondent shall not appear, *unless* the appellant shall prove that due notice of his intention to prosecute such appeal has been given to the respondent. The natural inference from that would seem to be, that, upon proof of such due notice having been given, the appeal *shall* be heard.]

JERVIS, C. J.—By giving judgment in favour of the party appearing, we can hardly be supposed to be deciding the case upon its merits, the respondent having retired from the contest. It certainly seems very unreasonable that we should bind the parliamentary committees by a decision pronounced upon a one-sided argument. It is a most unsatisfactory course; but we cannot help it. We must hear my brother *Kinglake*.

Kinglake, Serjt.—The question is whether William Hood was, on the 31st of July, disqualified, by reason of anything contained in the 22 G. 3, c. 41, s. 1, from *voting in the election of members to serve in [*5 parliament. That section enacts, that,—“for the better securing the freedom of elections of members to serve in parliament,”—“no commissioner, collector, supervisor, gauger, or other officer or persons whatsoever, concerned or employed in the charging, collecting, levying, or managing the duties of excise, or any branch or part thereof; nor any commissioner, collector, comptroller, searcher, or other officer

(a) *Cooper, app., Harris, resp.* (Clenishaw's case), 1 Lutw. Reg. Cas. 228, n. (*Austin's case*), 7, M. & G. 97 (E. C. L. R. vol. 49), 8 Scott, N. R. 921; *Colvill, app., The Town Clerk of Rochester, resp.*, 2 C. B. 60 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 380 (a); *Colvill, app., Wood, resp.*, 2 C. B. 210, 1 Lutw. Reg. Cas. 483; *Fox, app., The Overseers of Shaston St. Peter, Shaftesbury, resp.*, 6 C. B. 11 (E. C. L. R. vol. 60), 2 Lutw. Reg. Cas. 97.

(b) *Cooper, app., Harris, resp.*

or person whatsoever concerned or employed in the charging, collecting, levying, or managing the *customs*, or any branch or part thereof; nor any commissioner, officer, or other person concerned or employed in collecting, receiving, or managing any of the duties on stamped vellum, parchment, and paper; nor any person appointed by the commissioners for distributing stamps; nor any commissioner, officer, or other person employed in collecting, levying, or managing any of the duties on salt; nor any surveyor, collector, comptroller, inspector, officer, or other person employed in collecting, managing, or receiving the duties on windows or houses; nor any postmaster, postmasters-general, or his or their deputy or deputies, or any person employed by or under him or them in receiving, collecting, or managing the revenue of the post-office, or any part thereof; nor any captain, master, or mate of any ship, packet, or other vessel employed by or under the postmaster or postmasters-general in conveying the mail to and from foreign ports,—shall be capable of giving his vote for the election of any knight of the shire, commissioner, citizen, burgess, or baron, to serve in parliament for any county, stewartry, city, borough, or cinque port, or for choosing any delegate in whom the right of electing members to serve in parliament for that part of Great Britain called Scotland, is vested: And if any person hereby made incapable of voting as aforesaid, shall nevertheless presume to give his vote during the time he shall hold, or within *6] twelve calendar months after he *shall cease to hold or execute, any of the offices aforesaid, contrary to the true intent and meaning of this act, such votes so given shall be held null and void to all intents and purposes whatsoever, and every person so offending shall forfeit the sum of 100*l.*," &c. It is submitted that no reasonable doubt can be entertained that this person is within the words as well as the spirit of the act. The object of the act, was, to prevent the undue exercise of government influence at elections: and one having only the occasional employment described in this case, is more likely to be affected by such influence even than one holding a permanent office. In Harris Fudger's case, Falc. & Fitzh. 353, the Kinsale committee held the vote of an occasional tide-waiter to be good, under the 43 G. 3, c. 25. [MAULE, J.—In that case, probably, the committee were not informed as to the precise nature of the party's employment. Here, we are told that these extra tide-waiters are to be ready to act whenever the business of that department may be in excess. Are any of the tide-waiters in *constant* employment?] The case finds expressly that Hood made the declaration which the 10th section of the 8 & 9 Vict. c. 85, requires to be made by "every person who shall be appointed to any office or employment in the service of the customs, under the control and direction of the commissioners of Her Majesty's customs;" and it is further found, that, when once placed upon the list, these extra or glut tide-waiters remain there until they resign, or decline to

act when called upon, or are discharged for misconduct. In Cooper, app., Harris, resp., Austin's case, 7 M. & G. 97, 8 Scott, N. R. 921, 1 Lutw. Reg. Cas. 207, a person appointed by the postmaster-general to carry letters from Cambridge to Waterbeach, and to receive the postage due upon the letters so carried, was held to be disqualified by the statute now in question. *So, in *Rex v. Salisbury*, 5 C. & P. 155 (E. C. L. R. vol. 24), one who was employed by a postmistress to carry [*7 letters from Dursley to Berkeley, at a weekly salary paid him by the postmistress, but which was repaid to her by the post-office, was held by PATTESON, J., to be a person *employed by the post-office*, within the 52 G. 3, c. 143, s. 2. The decision of the revising barrister, therefore, was clearly wrong, and must be reversed. [TALFOURD, J.—The guard of a mail-coach has, I think, been held not to be disqualified.] It was so held by the committee in the Cirencester case, 2 Fraser, 454 : (a) but there are decisions of committees the other way also.

JERVIS, C. J.—I am of opinion that the decision of the revising barrister in this case must be reversed. There is no doubt that a glut tide-waiter is within the mischief intended to be provided against by this act of parliament; for, he is directly under the influence of those who appoint him. That, however, would not be sufficient to disqualify him, unless the office held by him comes within the words of the act. But I think that the facts stated in this case show that Hood is an officer or person “concerned or employed in the charging, collecting, levying, or managing the customs,” within the meaning of the act. A regular tide-waiter, it seems, is more frequently employed than an extra or glut tide-waiter. But, in what other respect does the employment of the latter differ from that of the former? It appears from the case, that the collector of customs is empowered, by a general authority from the board of customs, to keep a list of persons who are to be ready to act as occasional or extra tide-waiters, whenever the business of that department may be in excess; that, when appointed and placed upon that list, they are liable to be called upon to act as *tide-waiters whenever there may be occasion for their services, [*8 being paid for such services by the job; and that extra tide-waiters make, once for all, the same declaration of office that is made by all other officers of the customs on their appointment, and that, when once placed upon the list, they remain there until they resign, or decline to act when called upon, or are discharged for misconduct. These extra tide-waiters, therefore, are bound to be ready to act whenever called upon. The position of the tide-waiter, thus, differs from that of the glut tide-waiter in this respect only, viz. that his employment is more constant, and his pay regular. For these reasons, I am of opinion that the case is within the letter as well as within the mischief of the act;

(a) And see *Butler's Case*, Falc. & Fitzh. 351.

and consequently that the respondent is disqualified to vote, and that his name must be removed from the register.

MAULE, J.—I am of the same opinion. It is clear that this respondent is an officer employed in the charging, collecting, levying, or managing the customs. He performs the duties of his office whenever called upon. The only thing that gives the least colour for a different opinion is the fact that he receives payment only for the work which he actually does: but that is also a payment for holding himself in readiness to perform the duties of the office when required. The glut tide-waiter, therefore, clearly comes within the description of an officer employed in levying or managing the customs: and perhaps he is more especially within the mischief contemplated by the act than any one else. He is placed on a list of persons to be called upon to work when their services are required, and paid by the job. He is therefore completely under the control of his superiors; and, if he should be guilty of any insubordination, and not prove a thorough-going hack, he might be kept *9] altogether unemployed. *I think the respondent has exercised a very sound discretion in abstaining from appearing to support the revising barrister's decision.

WILLIAMS, J.—The respondent is clearly within both the words and the mischief of the statute.

TALFOURD, J., concurred.

Decision reversed.

Borough of HARWICH.

EDWARD POWNALL, Appellant; DANIEL DAWSON, Respondent.
Nov. 13.

A. occupied under one landlord, at the yearly rent of 10*l*., "a stable, with a hay-loft over, built of brick, annexed to which, *but of a lower elevation*, was another brick building, to which again was annexed an irregular wooden building divided into three compartments." The whole were in the exclusive occupation of A., and were used by him for the purpose of his business of a wheelwright; but the access to each was by a door opening into a yard, also in A.'s exclusive occupation, there being no *internal* communication, except between two of the compartments of the wooden building:—Held, that the premises constituted "a building" within the 2 W. 4, c. 45, s. 27.

AN objection was duly taken by Edward Pownall to the name of Daniel Dawson being retained in the list of persons entitled to vote in the election of members to serve in parliament for the borough of Harwich, in respect of the occupation of property within the parish of St. Nicholas,—the name of the said Daniel Dawson being thus entered on the said list:—

Name.	Residence.	Qualification.	Situation of property.
Dawson, Daniel.	West Street.	Workshop, stable, and garden.	Out part, westward.

*The ground of the objection was, that the stable and work-shop were not so situated with respect to each other, that they [*10] could be united so as to form a qualification, or part of a qualification.

The premises described in the third column of the above entry, consisted of a two-stalled stable, with hay-loft over it, built of brick; annexed to which, but of a lower elevation, was another brick building, to which again was annexed an irregular wooden building, divided into *three* compartments. Each of these compartments, as well as each of the two brick buildings, had a door in front, opening into a yard, one side of which was bounded by this row of buildings, the opposite side by a high wall, in which was a door opening into the garden, which was also completely surrounded by a high brick wall. The end of the yard fronting the street was enclosed by folding wooden gates, and the opposite end by a high blank wall.

The voter was a wheelwright and coachbuilder by trade, and used all the buildings above mentioned for the purpose of his said trade, which he carried on there. He had never used the stable as such, but always as a painting shop. The adjoining brick building he had used as his carpentering shop, and the several compartments of the wooden building as places of deposit for the rough materials of his trade, and as stands for gigs and other carriages of his construction, or which were left with him for repair.

The three buildings, or portions of building, above mentioned, were closely annexed to each other; but there was no internal communication between them, except a door between the *two* compartments of the wooden building, which were used as stands for carriages.

The whole of the premises were occupied by the voter under one landlord, and at a yearly rent of 10*l.*, which was admitted to be the clear yearly value of them; and *the only ground of objection to [*11] him was that above mentioned.

Being of opinion that the common purpose for which the whole row of buildings was used, and its complete enclosure in the yard, gave it the character of a single building, the revising barrister disallowed the objection, and retained the name of Daniel Dawson in the said list.

In this, as in the preceding case, the respondent did not appear, and the affidavit of service of the notice required by the 6 & 7 Vict. c. 18, s. 64, was in like manner produced.

Kinglake, Serjt., for the appellant.—The question is, whether the premises described in the case together constitute a “building” within the meaning of the 2 W. 4, c. 45, s. 27.(a) There have been several decisions upon the subject: the substance of them, is, that *two* or more

(a) Which confers the right of voting in cities and boroughs, upon the occupier, as owner or tenant, of “any house, warehouse, counting-house, shop, or other building, being either separately, or jointly with any land within such city, borough, or place, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l.*”

buildings cannot be joined for the purpose of conferring the franchise. In Wright, app., The Town Clerk of Stockport, resp., 5 M. & G. 33 (E. C. L. R. vol. 44), 7 Scott, N. R. 561, 1 Lutw. Reg. Cas. 32, it was held that *part* of a building which was itself a building within the statute, if of sufficient value, will confer a vote. But a shop or other building cannot be joined for this purpose to a house, unless part of or immediately connected with it; the statute only meant to apply to an aggregation of buildings under one roof. Dewhurst, app., Fielden, resp., 7 M. & G. 182 (E. C. L. R. vol. 49), 8 Scott, N. R. 1013, 1 Lutw. Reg. Cas. 274, was the case of two distinct buildings. In Powell, app., *12] Price, *resp., 4 C. B. 105 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 586, A. occupied a shop, which, together with a house and other premises, also occupied by him, constituted a sufficient qualification in point of value, but neither being sufficient alone: the shop was separated from the rest of the premises by a yard, in the exclusive possession of A., but there was no complete curtilage or fence surrounding the whole, the yard being approached by a passage at the side of the shop, open to the street, which was also the property of A., but used by the tenant of the adjoining house in common with him: and it was held that the shop could not be joined with the other premises, so as to constitute one entire qualification, under the statute. The question of curtilage does not apply here, no part of the alleged qualification being a house: the circumstance, therefore, of the three workshops being within the curtilage, will not help the claimant. These buildings are not under one roof. [JERVIS, C. J.—Why not?] The case finds that they are irregular buildings, of different elevations; and that there is no *internal* communication between them. [MAULE, J.—If it be requisite, to constitute a “building” within this statute, that the whole should be covered by a roof of the same elevation throughout, what is called the Crystal Palace would not be a “building.” In Wright, app., The Town Clerk of Stockport, resp., each floor was held to be a distinct building, within the act.] WILLIAMS, J., in Toms, app., Lockett, resp., 5 C. B. 23 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 19, (a) expresses doubt as to the soundness of the decision in that case: “Notwithstanding,” *13] he says, “the case of *Wright, app., The Town Clerk of Stockport, resp., I am not satisfied that he [the claimant] is the occupier of a ‘building’ within that section. I doubt whether the general expression is satisfied by a *part of a building*.” Besides, there the tenant of each floor of the building had an immediate access from the outside. [MAULE, J.—Chambers in the inns of court are without doubt “buildings” within the statute.] For the same reason. In Jolliffe,

(a) Where it was held (*dubitante* WILLIAMS, J.), that one who has the exclusive occupation of apartments in a house, at a rent, having a key of the outer door, and free and uncontrolled access thereto at all times,—the landlord occupying a portion of the premises, but not residing therein,—is entitled to be registered as tenant of a “building.”

app., Rice, resp., 6 C. B. 1 (E. C. L. R. vol. 60), 2 Lutw. Reg. Cas. 90, a stable and coach-house adjoined each other, and were both under one roof: there were two grated windows in the wall that separated the two, but there was no other *internal* communication between them: and it was held that the two might be joined together, so as to constitute an occupation qualification under the statute. [MAULE, J.—That case clearly puts you out of court.] There, the whole was under the same roof. [JERVIS, C. J.—The voter did not occupy the room over the stable and coach-house. What do you understand by “the same roof?”] A continuous roof. [MAULE, J.—For this purpose, the whole of these buildings are under the same roof. The great round tower of Windsor Castle and the adjoining parts of the structure are all under one roof, though of different elevations.] There is no communication here between the roof of the one building and that of the others. [JERVIS, C. J.—I think the words of the statute are satisfied, if there is no other house or building intervening. WILLIAMS, J.—You admit, that, if there were any *internal* communication here, the party would be entitled to vote?] That must be conceded.

JERVIS, C. J.—It seems to me that this case is as free from difficulty as the last. Every decision bearing upon the question has very properly been cited by my brother **Kinglake*. Many of them, [*14 when examined, are found to be very much against the appellant. The premises described in the case are, as it seems to me, for all the purposes of the act a building under one roof: they are not separated from each other by any intervening building or space; but the whole are closely adjoining each other, and are held by the voter under the same landlord. I think it is impossible to say that they do not constitute a building within the act.

MAULE, J.—I also think the respondent in this case gained the right to vote in respect of his occupation of a building of the clear yearly value of not less than 10*l*. The premises consist of a two-stalled stable, with hay-loft over it, built of brick, and also of another brick building annexed thereto, but of a lower elevation, and also of what the revising barrister describes as an irregular wooden building, divided into three compartments. The case finds that the whole of these premises are closely annexed to each other, and are occupied by one man for the purposes of one business, and under the same landlord; but that there is no *internal* communication between them. We are entirely relieved here from all question as to curtilage: all that is wanted is unity. Two or more separate buildings cannot be joined for the purpose of making up the required qualification. But the premises here described do not, I think, constitute two or more separate buildings: they are all occupied by one man for one purpose, though he has to get to one by one way, and to the others by another way; and the whole are under one roof, though not precisely at the same elevation. Some of the

cases which have been referred to, have decided that a *part* of a house or building, if occupied separately and exclusively, will, under certain *15] circumstances, confer a right of voting, although other *parts of it may also be in the occupation of other persons. I think that a man who occupies two floors of a house, may acquire a vote as the occupier of a building within the act. (a) The term "building" has, in favour of the franchise, been held to be satisfied by a part of a building. But the question here is, not whether the premises described constitute part of a building, but whether the whole may, under the circumstances stated, be considered as one entire building. For the reasons already urged, I think they may, and that the decision of the revising barrister was correct.

The rest of the court concurring,

Decision affirmed.

(a) See *Pitts app., Smedley resp.*, 7 M. & G. 85 (E. C. L. R. vol. 49), 8 Scott, N. R. 907, 1 Lutw. Reg. Cas. 196.

Borough of SHREWSBURY.

WILLIAM JARVIS (on behalf of himself and EDWARD ELKES),
Appellant; JOSHUA JOHN PEELE, Town Clerk of SHREWS-
BURY, Respondent. Nov. 13.

A., a freeman of the borough of Shrewsbury paying scot and lot, for upwards of two years last past, and down to the 25th of March, 1851, occupied and resided in a house on the Wyle Cop, within the ancient and present limits of the borough, and, since the 25th of March, down to and on the 31st of July, occupied and resided in a house at Coton Hill, without the ancient but within the present limits of the borough. The revising barrister, holding him to be disqualified by the 2 W. 4, c. 45, s. 32, expunged his name from the list of freemen voters:—The court, without hearing any argument (the counsel for the respondent admitting that he could not support it), reversed the decision.

JOHN MANSELL objected to Edward Elkes having his name retained on the list of voters as a freeman for the borough of Shrewsbury.

*16] *The right of voting, previously to the passing of the statute 2 W. 4, c. 45, was in the burgesses inhabiting, on the day of election, within the borough of Shrewsbury, or in the suburbs thereof, paying scot and lot, and not receiving alms or charity.

The present boundary of the borough, as defined by the statute 2 & 3 W. 4, c. 64, is more extended than the limits of the ancient borough.

It was proved that Edward Elkes was a freeman of the said borough; that, on the 31st of July, 1851, he occupied and resided in a house on the Wyle Cop, in the parish of St. Julian, within the limits of the ancient and present borough, and that he had so occupied and resided in that house from the 25th day of March last, and up to the time of the revision; that, for upwards of two years last past, and up to the said 25th of March, he had occupied and resided in a house and premises at Coton Hill, in the parish of St. Mary, without the ancient limits of the borough,

but within the present limits; that he had been duly rated to, and had paid, his rates and taxes for both houses and premises, and had resided within the ancient and present limits of the said borough since the 25th of March last, and, prior to that time, and for two years, within seven miles from the polling place of the said borough, and within the limits of the new borough.

On behalf of Edward Elkes, it was contended that he was possessed of the requisite qualification on the 31st of July, and therefore entitled to have his name retained on the list.

It was objected, that, under the statute 2 W. 4, c. 45, s. 82, Elkes was not entitled to vote as a freeman, by reason of his residence, and paying scot and lot for the dwelling-house on Wyle Cop, within the ancient and present limits of the borough, on account of such occupation and residence being for less than six months *before the 31st of July; and that his residence at Coton Hill, within the present [*17 limits, but not within the ancient limits of the borough, though within seven miles from the polling place of the said borough, did not, with the subsequent residence in the borough, confer the right to vote.

The revising barrister held the objection good, and expunged the name of Edward Elkes from the list.

The case of William Jarvis, whose claim as a freeman of the borough rested upon grounds similar to the above, and was in like manner disallowed, was consolidated with the principal case, and Jarvis was named appellant, to prosecute such consolidated appeal, and the Town Clerk of Shrewsbury respondent.

Whateley appeared for the appellant; but

Selfe, who appeared on behalf of the respondent, admitting that he was unable to support the decision of the revising barrister, the appeal was allowed, without argument. Decision reversed.

*Borough of CAMBRIDGE.

[*18

JOHN EADEN, Appellant; CHARLES HENRY COOPER, Town Clerk of CAMBRIDGE, Respondent. Nov. 13.

Where there is an inaccuracy in the description of the qualification in a notice of claim to be inserted in a list of borough voters, the proper course for the revising barrister, is, not to amend the claim (under the 6 & 7 Vict. c. 18, s. 40), but to treat the notice as sufficient, provided the mistake or misdescription is such as would have been amendable if in a list of voters.

THE borough of Cambridge consists of fourteen parishes. The claimant, John Rolph Mann, was inserted by the overseers of the parish of St. Andrew the Great, in the said borough, in the list of persons entitled to vote in the election of members of parliament for the said

borough, in respect of property occupied within the said parish of St. Andrew the Great, as follows :—

Christian name and surname of each voter at full length.	Place of abode.	Nature of qualification.	Street, lane, or other like place in this parish, and number of house, if any, where the property is situate.
John Rolfe Mann.	St. Andrew's Hill.	House.	St. Andrew's Hill.

John Eaden objected to the name of the said John Rolfe Mann being retained on the said list ; and, it being proved before the revising barrister that the qualification depended on the successive occupation of two houses, viz., a house No. 15, Hill's Road, in the parish of St. Andrew the Less, and the said house on St. Andrew's Hill, in the parish of St. Andrew the Great, the revising barrister decided that the objection should prevail, and the name be expunged.

*19] The said John Rolfe Mann then proved the due *service of a notice of claim upon the overseers of the said parish of St. Andrew the Great, in the following form :—

“To the overseers of the parish of St. Andrew the Great, in the borough of Cambridge.

“I hereby give you notice that I claim to have my name inserted in the list made by you of persons entitled to vote in the election of members for the borough of Cambridge, and that the particulars of my qualification and place of abode are stated in the columns below. Dated the 22d day of August, 1851.

Christian name and surname of the claimant at full length.	Place of abode.	Nature of qualification.	Street, lane, or other place in this parish where the property is situate, and number of house, if any.
John Rolfe Mann.	St. Andrew's Hill.	House.	St. Andrew's Hill, in the successive occupation of and from a house, No. 15, Hill's Road.
(Signed)			“JOHN ROLFE MANN.”

This claim was duly published by the overseers of St. Andrew the Great, in their list of claimants for that parish ; and, in the fourth column of such list, the qualification was thus described :—“St. Andrew's Hill, in successive occupation of and from a house, No. 15, Hill's Road.”

It was proved before the revising barrister, that the house No. 15,

Hill's Road, was in the parish of St. Andrew the Less, and that the street called Hill's Road ran into two different parishes, viz. St. Andrew the Great, and St. Andrew the Less.

The appellant thereupon objected that the notice of claim was, upon the face of it, for two houses in the *same parish, viz., St. Andrew the Great, and was on that ground a bad claim for a qualification [*20 consisting of the occupation of two houses in different parishes; that the claimant could not give evidence of any other qualification than that which was described in the claim; and that the revising barrister was not at liberty to change the description of the qualification, by adding the name of the true parish to the house No. 15, Hill's Road.

The revising barrister decided that the notice of claim was insufficient as it stood, in stating merely the qualification in the fourth column to be in respect of successive occupations of houses in St. Andrew's Hill, and No. 15, Hill's Road, which, by reference to the heading of that column, appeared to be both in the parish of St. Andrew the Great; whereas, the street called Hill's Road was in two different parishes, viz., St. Andrew the Great and St. Andrew the Less, and the house No. 15, Hill's Road, was in fact in the parish of St. Andrew the Less: but he held that he might, the more accurately to define it, amend the claim, by adding to the description of the house, the parish in which it was situate, and thereby enable the claimant to give evidence in support of successive occupations in the two parishes; and, as the vote was proved in other respects, he inserted the name of the said claimant in the list of voters for the said borough in the parish of St. Andrew the Great.

Upon the same grounds, the revising barrister allowed the votes of John Trevis, a claimant in the parish of St. Andrew the Great, Jermyn Brown, Edward Jarman, and Thomas Machin, severally claimants in the parish of St. Andrew the Less, Matthew Gray, a claimant in the parish of St. Botolph, and John Lambert, a claimant in the parish of St. Mary the Less, and inserted the names of the said several parties on the list of voters for the said respective parishes.

The cases of these six persons were consolidated with *the principal case; and the several claimants having respectively declined [*21 to support the above decision, the Town Clerk of Cambridge was named respondent in such consolidated appeal.

The question for the opinion of the court was, whether, under the circumstances above stated, the revising barrister had power to amend the claim of John Rolfe Mann, by adding the name of the parish of St. Andrew the Less to the description of the house No. 15, Hill's Road, in the fourth column; and whether he had power to receive evidence, under that claim, of a qualification consisting of the successive occupations of two houses in two different parishes. If the court should be of opinion that the revising barrister had such power, then the lists

of voters for the said borough as revised, were to stand without amendment: but, if the court should be of a contrary opinion, then the said lists were to be amended, by expunging the names of the said John Rolfe Mann and John Trevis from the said list of the parish of St. Andrew the Great, and the names of the said Jermyn Brown, Edward Jarman, and Thomas Machin from the said list of the parish of St. Andrew the Less, and the name of Matthew Gray from the said list of the parish of St. Botolph, and the name of the said John Lambert from the list of the parish of St. Mary the Less.

Couch, for the appellant.—The revising barrister has decided against the validity of the original claim; but he does not furnish the court with the means of judging as to its sufficiency. The only questions, therefore, are, whether he had power to amend *the notice of claim*, and whether he had power to receive evidence of the claim as amended. The two questions, in effect, resolve themselves into one,—whether the barrister had power to amend. It is submitted that this amendment *22] is not within *the power vested in the revising barrister by the 6 & 7 Vict. c. 18, s. 40.(a) There is a material distinction between claims for counties and claims for boroughs: in the latter, the barrister has no power to amend the *claim*; in the former he has. In the case of county voters, the list of claimants is to be prepared by the overseers,—6 & 7 Vict. c. 18, s. 5, which list, together with the copy of the register, is to be deemed to be the list of voters of such parish, &c.,—s. 6; and by s. 37 it is enacted, “that if any person who shall have given to the overseers of any parish or township due notice of his claim to have his name inserted in the list of persons entitled to vote in the election of a knight or knights of the shire, shall have been omitted by *23] such overseers from such list, it *shall be lawful for the revising barrister, upon the revision of such list, to insert therein the name of the person so omitted, in case it shall be proved to the satisfaction of such barrister that such person gave due notice of such his claim to

(a) Which enacts “that the revising barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote and also the name of every person who shall be proved to him to be dead; and wherever the Christian name, or the place of abode, or *the nature of the qualification*, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted, in any case where the same is by this act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or *the nature or description of his qualification*, shall, in the judgment of the revising barrister, be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted, or insufficiently described, be supplied, to the satisfaction of such barrister, before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list: Provided always, that, whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same.”

the said overseers, and that he was entitled, on the last day of July then next preceding, to be inserted in the said list of voters." But, as to boroughs, the position of things is different. The 15th section enacts, "that every person whose name shall have been omitted in any such list of voters for any city or borough, so to be made out as aforesaid (ss. 13, 14), and who shall claim as having been entitled, on the last day of July then next preceding, to have his name inserted therein, and every person desirous of being registered for a different qualification than that for which his name appears in the said list, shall, on or before the 25th of August in that year, give or cause to be given a notice according to the form numbered 6, in the said schedule (B), or to the like effect, to the overseers of that parish or township in the list whereof he shall claim to have his name inserted; or, if he shall claim as a freeman of any city or borough or place sharing in the election therewith, then he shall, in like manner, give or cause to be given to the town clerk of such city, borough, or place, a notice, according to the form numbered 7, in the said schedule (B), or to the like effect: and the overseers and town clerks respectively shall include the names of all persons so claiming as aforesaid, in lists, according to the forms numbered 8 and 9, respectively in the said schedule (B)." [JERVIS, C. J.—This case is in effect decided by *Wood, app., The Overseers of Willesden, resp.*, 2 C. B. 15 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 314, unless there is the distinction you contend for between county and borough claims.] Precisely so. TINDAL, C. J., in that case alludes to these different provisions. In boroughs, the lists of voters *(other than freemen) are [*24 prepared by the overseers: persons omitted from these lists are to give notice of their claims. [MAULE, J.—In the case of counties, the revising barrister is doing something useful when he amends. But, why should he amend a *claim* in the case of a borough? It is never wanted again.] It is merely to show what claims are made before the revising barrister. [JERVIS, C. J.—In *Lockett, app., Knowles, resp.*, 2 C. B. 187 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 451, it was held that the amending power is to be construed liberally.] The 40th section in terms refers to the list of voters,—referring back to a preceding section (s. 38), which enacts "that the revising barrister shall insert in any *list of voters* for any city or borough, the name of every person omitted who shall be proved to the satisfaction of such barrister to have given due notice of his claim to be inserted in *such list*, and to have been entitled, on the last day of July then next preceding, to have his name inserted therein in respect of the qualification described in such notice of claim." The 42d section also shows that the list meant is the list of voters. There are two cases in which this matter has been under discussion, viz., *Hitchins, app., Brown, resp.*, 2 C. B. 25, 1 Lutw. Reg. Cas. 328, and *Flounders, app., Donner, resp.*, 2 C. B.

63, 1 Lutw. Reg. Cas. 365.(a) In the former, though it formed no
 *25] *part of the decision, one of the learned judges (Mr. Justice
 COLTMAN) expressed an opinion that the 40th section was appli-
 cable to such a case as this. He says: "I think the revising barrister
 was well warranted in amending the description, and that this is pre-
 cisely the sort of case that the 40th section contemplated. The barrister
 is prohibited from changing the qualification, except for the purpose of
 more clearly and accurately defining the same. Here, the qualification
 remains substantially the same as before the amendment; only it is a
 little more clearly and accurately defined." The distinction between
 counties and boroughs was not adverted to there. [MAULE, J.—The
 38th section of the 6 & 7 Vict. c. 18, enacts "that the revising bar-
 rister shall insert in any list of voters for any city or borough the
 name of every person omitted who shall be proved to the satisfaction
 of such barrister to have given due notice of his claim to be inserted
 in such list, and to have been entitled, on the last day of July then
 next preceding, to have his name inserted therein in respect of the
 qualification described in such notice of claim." All that the barrister
 has to do, is, to see whether or not the claimant has given due notice;
 and, for that purpose, he can only look at the notice itself. Of what
 possible use can it be to amend the *claim*? If the claim be found not
 to be quite satisfactory, but still to be such as he thinks ought to be
 acted upon, he ought, I think, to decide that due notice has been given.
 Whether or not the thing amounts to notice, may depend upon circum-
 stances. But, if the barrister finds it to be inaccurate, but that the
 error is such, that, if it had occurred in a list of voters he would have
 been justified in amending it, that would be a sufficient reason for hold-
 ing the notice to be a due notice.] Here, the barrister has decided the
 notice of claim to be insufficient. [JERVIS, C. J.—I do not understand
 the question as to the sufficiency of the claim, to be open to us upon
 *26] *this case.] It is submitted that it is not. The claim, in a borough,
 is not in a list which the barrister is revising. [MAULE, J.—Sup-
 pose there is an immaterial error in the notice of claim, although the
 barrister need not amend the claim, still he is not bound to adopt the
 misdescription in it. There is nothing in the act to require him to put
 the description of the qualification on the register in the precise words
 of the claim.] He may not be bound to insert the claim literally.

(a) It was there decided, that, where a voter's qualification appears in the list [claim] to con-
 sist of a successive occupation of houses, the numbers of *each*, if each has a number, must be
 stated: and ERLZ, J., suggested, that, if the omission of the number be supplied to the revising
 barrister pending the revision, he is bound to amend the description, under s. 40 of the 6 & 7
 Vict. c. 18. "The barrister," says the learned judge, "clearly was right in expunging the name,
 if he thought the description insufficient, or if it was wholly omitted, and not supplied to his
 satisfaction before the completion of the revision. I am clearly of opinion, that, if the number
 has been brought to the revising barrister, he had power, under the 40th section, to insert it, and
 was bound to insert it."

But here he has found it to be insufficient: and he professes to amend *the claim*, by inserting therein the true description of the premises, and *thereby* to enable the claimant to give evidence in support of successive occupations in the two parishes.

Wheeler, for the respondent, was not heard.

JERVIS, C. J.—As I understand the case, the revising barrister seems to have considered that he was precluded from considering the claim under the description used. In that he was wrong. I think he was bound to receive evidence under the claim as made.

MAULE, J.—The barrister has done substantially right, but not formally. He thought the notice of claim insufficient; but he amends it, which can do no good. If the claim gives such notice that anybody would understand what was meant to be conveyed by it, no amendment could be necessary. The substantial justice of the case is clearly with the respondent: but, as it is defective in point of form, the appellant may perhaps be entitled to have it sent back to the revising barrister to be re-stated,^(a) if he thinks it worth his while.

WILLIAMS, J., and TALFOURD, J., concurred.

Decisions affirmed, without costs.

(a) *Couch*, for the appellant, declined to avail himself of this suggestion.

*ISLE OF WIGHT.

[*27

SHEDDON, Appellant; BUTT, Respondent. Nov. 13.

The court refused to hear an appeal (or to allow it to stand over), where the appellant had failed, on the respondent's default, to deliver copies of the case to the two junior puisne judges.

UPON this case being called on, it appeared that no paper-books had been delivered to the two junior puisne judges, whereupon the court ordered the appeal to be struck out.

Poulden, for the appellant, who had in due time delivered paper-books to the lord chief justice and the senior puisne judge, prayed that the case might be allowed to stand over, to give him time to supply the omission. He referred to *Newton v. The Overseers of Mobberley*, 2 C. B. 203 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 335, and *Newton v. The Overseers of Crowley*, 2 C. B. 207, 1 Lutw. Reg. Cas. 335, where, the appellant having neglected to give the notice required by the 6 & 7 Vict. c. 18, s. 64, the respondent having agreed to waive it, the court postponed the hearing of the case, in order to give the appellant an opportunity to comply with the statute.

JERVIS, C. J.—The court can only entertain these appeals according to the ordinary rules and practice as to special cases. To do other-

wise, would be directly acting in the teeth of the act of parliament.(a)

*28] The *cases referred to are not to the point: the court there proceeded, perhaps correctly, on the ground that the appellant had been "lulled into security by the supposed waiver." The appeal must be struck out.(b)

The rest of the court concurring,

Appeal struck out.(c)

(a) The 50th section of the 6 & 7 Vict. c. 18, enacts, "that all appeals or matters of appeal from or in respect of any decision of any revising barrister entertained in manner thereinbefore mentioned [s. 42], shall be prosecuted, heard, and determined in and by her Majesty's Court of Common Pleas at Westminster, according to the ordinary rules and practice of that court with respect to special cases, so far as the same may be applicable, and not inconsistent with the provisions of this act, or in such manner and form, and subject to such rules and regulations, as the said court, from time to time, by any rule or order made for regulating the practice and proceedings in such appeals, shall order and direct."

(b) See Allan, app., Waterhouse, resp., 7 Scott, N. R. 485, 1 Lutw. Reg. Cas. 93 (a), where the respondent having delivered paper-books to the two junior puisne judges, but none having been delivered to the lord chief justice and the senior puisne judge, the court allowed the case to stand over.

(c) The practice as to the delivery of paper-books is regulated by the rule of Hilary Term, 4 W. 4, s. 7, which provides, that, "four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer-book, special case, or special verdict, to the lord chief justice of the King's Bench or Common Pleas, or lord chief baron, as the case may be, and the senior judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority; and, in default of either party, the other party may, † on the day following, deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies."

† This is construed to be imperative: see Hooper v. Woolmer, 10 Com. B. 370 (E. C. L. R. vol. 70), where it was held, that, where the plaintiff has delivered all the demurrer-books, he cannot call upon the defendant to pay for those delivered to the junior puisne judges, as a condition of his being heard, unless he has himself strictly complied with the rule, by delivering the books for the defendant on the day following that on which the defendant should have delivered them.

*29] *WARWICKSHIRE.—NORTHERN DIVISION.

Coventry Polling District.

JOSIAH SMITH BEAMISH, Appellant; The Overseers of the Parish of STOKE, Respondents. Nov. 13.

An allottee of three shares in a building society, in October, 1850, purchased freehold land, of the value of 6*l.* per annum. The amount of the purchase-money and expenses (84*l.* 14*s.*) was advanced to him by the society upon mortgage of the land so purchased.

By the rules of the society each member was required to pay 1*s.* 6*d.* weekly for each share, and to execute to the trustees a mortgage to secure to them the sum in which the member may be indebted to the society, "with a premium for prior advance equal to 5*l.* per cent. per annum upon the amount advanced until repaid, and such sum, not exceeding 2*s.* 6*d.* per share per annum, for incidental expenses, as the committee should think fit,"—such mortgage reserving to the trustees a power of sale, in case the member should fail for twenty-six weekly meetings to pay, observe, and perform all or any of the subscriptions, payments, covenants, agreements, and regulations on his part to be paid, observed, &c.

No default had been made in the payment of the contributions required by the rules; and the mortgagor had always been, and still remained, in actual possession of the property. The amount of principal money due to the society on the 30th of January, 1851, was 47*l.* 10*s.* 3*d.* The weekly contributions of 1*s.* 6*d.* per share (amounting to 11*l.* 14*s.* per annum) were appropriated by the society thus,—8*l.* 18*s.* in part liquidation of the principal mortgage debt, 2*l.* 10*s.* for premium or interest, and 6*s.* for incidental expenses:—

Held, that these contributions constituted a “charge” upon the land, within the meaning of the statute 8 H. 6, c. 7, and consequently that the mortgagor was not possessed of an estate “of the clear yearly value of 40*s.* at the least, above all charges.”

At a court held at Coventry, for the revision of the list of voters for the parish of Stoke, in the Northern Division of the county of Warwick, John Benbow Hebbert objected to the name of Josiah Smith Beamish being retained upon the list of voters for the said parish in respect of property there situate.

The claimant, Josiah Smith Beamish, is a member of the Coventry and Warwickshire Benefit Building and Investment Society, established under the provisions of the statute 6 & 7 W. 4, c. 32, in which he held three shares.

*A copy of the rules of the society, as certified and allowed by [*30 the barrister, was appended to, and to form a part of, the case.

Rules 5 and 7(a) of the society require each member to pay 1*s.* 6*d.* weekly for every share he may hold: and rule 12 provides “that all members, upon receiving the amount advanced, shall execute to the trustees for the time being a legal mortgage of the property offered as security, to secure to them the sum which he may then be indebted to the society, with a premium for prior advance, equal to 5*l.* per cent. per annum upon the amount advanced until repaid, and such sum, not exceeding 2*s.* 6*d.* per share, per annum for incidental expenses, as the committee shall fix; and that, in the said mortgage to be executed upon the advance of any money in respect of any share or shares so allotted as aforesaid, it shall be provided, that, in case the member taking the same shall at any time hereafter fail, neglect, or refuse, for twenty-six weekly meetings to pay, observe, and perform all or any of the subscriptions, payments, covenants, and agreements, and regulations, on his part respectively to be paid, observed, and performed, then the trustees, with the consent and by the order of the committee for the time being, shall have the power either to appoint a person or persons to collect the rents and profits of the *premises in the mortgage deed mentioned, or absolutely, with or without the concurrence [*31

(a) Rule 5 provides “that the subscriptions to this society be paid weekly, at such time and place as the committee for the time being shall appoint.”

Rule 7. “That, on every subscription night, each member shall pay 1*s.* 6*d.* to the fund, for every share he may hold; but no member shall hold more than six shares. Should any member neglect to pay his contributions till he be four nights in arrear, he shall forfeit 3*d.* for each share, and the same sum per share for every subsequent night till he have paid up his arrears; and the stewards are hereby empowered to deduct the amount of any forfeits from the first money tendered by such defaulters; but, should the member fined tender no subscriptions until his fines amount to the sum already paid in, the same shall be deemed and treated as forfeited to the society.”

and consent of the said members, to sell and dispose of all or any part of the said premises, by public auction or private contract, for the most money that can be had for the same, and shall receive the purchase-money arising therefrom, and with liberty to buy in the same on behalf of the society, and re-sell the same, without being answerable for any loss to be occasioned by such re-sale; and that the said trustees, out of the money to arise from such collection of rents and profits, or such sale or sales, as aforesaid, in the first place shall discharge all costs, charges, and expenses which may be incurred on account of such collection of rents, or sale or sales, or in any wise relating to the said trusts in the said mortgage security contained, and, in the next place, retain and reimburse themselves, on account of the society, all such principal money, subscriptions, and other payments, as shall then be due, owing, and payable by such member under and by virtue of these rules and the aforesaid mortgage; and also (in the case of such sale or sales) shall retain to themselves, on account of the society, the full amount of all and every the subscriptions and premium which would, according to the rules and regulations for the time being of the society, have thereafter become payable by such member, as if the same were then in arrear; and, after full payment and satisfaction thereof as aforesaid, shall pay the surplus (if any) arising from such sale or collection of rents, to the said member, his heirs, executors, or administrators; and in the said mortgage shall also be contained all such further powers, provisoes, covenants, and agreements as the said trustees shall consider proper for the security and welfare of the society;" "and that, if any member of this society who shall have received his share or shares, or, in case of death, the legal representatives of any member, shall be desirous of *32] redeeming the security *or securities which shall have been given for the same, and shall give notice of such desire to the committee, the committee shall, within one month thereafter, settle the terms (according to the particular circumstances of each case) on which the member shall be allowed to redeem, and, on compliance with such terms, and payment of all fines due in respect of such shares, the committee shall direct the trustees to deliver all deeds and other documents in their custody, relating to the security, to the member, and endorse a receipt or acknowledgment on such mortgage, according to the 6 & 7 W. 4, c. 32, s. 5."

On the 19th of October, 1850, the claimant became the purchaser, in fee-simple, of a piece of building land in Avon Street, in the said parish of Stoke, of the annual value of 6*l.*, and received a conveyance, and entered into possession thereof accordingly, and on the 20th of October executed a mortgage thereof,—a copy of which was appended to, and was to form part of, the case,—to the trustees of the society.

At the date of the mortgage, the society had advanced to the claimant 84*l.* 14*s.*, which sum was made up as follows:—

Purchase money of land	- - - - -	£71 11 3
Legal expenses	- - - - -	4 1 6
Incidental expenses, at 2s. per share, or 6s. per annum	- - -	1 19 0
Premium at the rate of 5l. per cent. Interest on the balance of 55l. 15s. 3d. then unpaid on three shares, until the same would be paid by the weekly payments of 1s. 6d. per share, or 4s. 6d. per week	- - -	7 2 3
Total		<u>£84 14 0</u>

This mortgage is still unsatisfied; but the ordinary contributions of 1s. 6d. per share, or 4s. 6d. weekly (required to be paid by the claimant, agreeably to the *proviso in the mortgage deed and the rules of the society, on account of both principal and interest), amount to the sum of 11l. 14s. per annum. [*33]

No default has been made in payment of these contributions; and the claimant has always been, and is now, in the actual possession of the property.

It was proved, that, on the 30th of January, 1851, the sum then remaining unpaid and actually due to the society from the claimant, in accordance with the rules thereof, was 47l. 10s. 3d.; and that, since that time, on receipt of the ordinary contributions to the society by the secretary, they have been appropriated by him, from time to time, in his accounts with the claimant, in the following proportions and manner, viz. 8l. 18s. in part liquidation of the principal of the mortgage debt, 6s. for incidental expenses (being the expenses of working the society), and 2l. 10s. for premium or interest, such premium or interest being calculated on the amount of principal money then remaining unpaid to the society.

For the claimant, it was contended, that the contributions of 4s. 6d. weekly, for the three shares, ought not to be deducted from the annual value of the qualification, but only so much thereof,—viz. 2l. 16s. per annum,—as was charged for incidental expenses, and interest on the said principal sum of 47l. 10s. 3d. due on the 30th of January last, and on payment of which on that day, the trustees must have endorsed a receipt on the mortgage deed, pursuant to the 5th section of the above-mentioned act and the 12th rule of the society; which would leave 3l. 4s. as the annual value of the claimant's interest in the property; and that the rest of the contributions must be taken to be, and were, specific repayments of the principal money remaining due on the mortgage.

On the part of the objector, it was contended, that the arrangement between the claimant and the building society was in substance and effect a mortgage, whereby *the amount advanced and the interest were secured and made payable by weekly instalments or “contributions;” and that such “contributions” were, in law as well as in fact, an “annual charge” upon the estate, beyond its “annual value,” thereby reducing the present interest of the claimants therein to less than the value of “forty shillings by the year above all charges.” [*34]

The revising barrister was of opinion, that the weekly payment of 4s. 6d., for which the claimant was liable under the rules of the society, and which was secured by the mortgage, was a charge upon the estate, and should be deducted from the annual value thereof; and that such deduction reduced the annual value of the estate below 40s.: and he erased his name from the list of voters.

If the Court of Common Pleas should be of opinion that only so much of the said weekly payment of 4s. 6d. as was payable in respect of interest, viz., amounting to the sum of 2l. 16s. per annum, ought to be deducted from the annual value of the claimant's property, then the claimant's name was to be restored to the list of voters. If otherwise, his name was to remain erased.

The cases of eleven other claimants, whose names were endorsed on the case, and which depended upon the decision in the principal case, were consolidated therewith.

D. Keane (with whom was *Lutwyche*), for the appellant.—Notwithstanding the decisions which have taken place in this court upon this subject, it is submitted, that, upon the facts found, it was the duty of the revising barrister to hold that the annual value of the claimant's interest in the property in question was 3l. 4s., and consequently his name should have been retained upon the list of voters. The 74th section of the 6 & 7 Vict. c. 18, enacts "that no mortgagee of any lands *35] or tenements *shall have any vote in the election of a knight or knights of the shire, or in the election of a member or members to serve in any future parliament for any city or borough in which freeholders now have a right to vote, for or by reason of any mortgage estate therein, unless he be in the actual possession or receipt of the rents and profits thereof; but that the mortgagor in actual possession or in receipt of the rents and profits thereof, shall and may vote for the same, notwithstanding such mortgage." The case finds that the claimant has always been, and now is, in the actual possession of the property. The court, however, has held that his being in actual possession does not absolve him from showing that the interest he has in the property is of sufficient value to confer a vote under the earlier statutes. The first of these is the 8 H. 6, c. 7, the title of which is—"What sort of men shall be choosers, and who shall be chosen knights of the parliament." The 1st section recites that "whereas the elections of knights of shires to come to the parliament of our lord the King, in many counties of the realm of England, have now of late been made by very great, outrageous, and excessive numbers of people dwelling within the same counties of the realm of England. of which most part was of people of small substance, and of no value, whereof every of them pretended a voice equivalent, as to such elections to be made, with the most worthy knights and esquires dwelling within the same counties, whereby manslaughter, riots, batteries, and divisions among the gentlemen and other

people of the same counties shall very likely rise to be, unless convenient and due remedy be provided in this behalf." It then proceeds,—“Our lord the King, considering the premises, hath provided, ordained, and stablished, by authority of this present parliament, that the knights of the shires to be chosen within the same realm of England to come to the parliaments of our lord the King *hereafter to be holden, [*36 shall be chosen, in every county of the realm of England, by people dwelling and resident in the same counties, *whereof every one of them shall have free land or tenement to the value of 40s. by the year at the least, above all charges*; and that they which shall be so chose shall be dwelling and resident within the same counties; and such as have the greatest number of *those that may expend 40s. by year and above*, as afore is said, shall be returned by the sheriffs of every county knights for the parliament, by indentures sealed between the said sheriffs and the said choosers so to be made: and every sheriff of the realm of England shall have power, by the said authority, to examine upon the Evangelists every such chooser, *how much he may expend by the year*,” &c. The question is, what is the meaning of “beyond all charges.” In the ancient language of the act the words are “*oultre les reprises*.” In *Termes de la Ley*, “Reprises” are said to be, “deductions, payments, and duties that go yearly, and are paid out of a manor; as rent-charge, rent-seck, pensions, corrodies, annuities, fees of stewards or bailiffs, and such like:” and in *Jacob’s Law Dictionary*, the term is said to be used for “deductions and payments out of a manor or lands: as, rent-charges, annuities, &c.; and, therefore, when we speak of the clear yearly value of a manor or estate of land, we say it is so much *per annum ultra reprises*, besides all *reprises*.” In other words, the expression means deductions from the profits of the land. It may be conceded here, that the interest upon the unpaid balance of the mortgage-money, and the incidental expenses, would be a charge upon the land; but the residue of the annual payment is not: it is an outgoing of which the claimant gets the benefit; it in effect enlarges his interest. [JERVIS, C. J.—The estate which the party has is at this moment, as the case finds, worth 6*l.* per annum; and the annual payments charged upon *the land amount to 11*l.* 14*s.* MAULE, J.—How much may this [*37 man expend by the year?] The value of the land is 6*l.* per annum: the legitimate charges or “*reprises*” therefrom being 2*l.* 16*s.*, the claimant has 3*l.* 4*s.* per annum, which he expends in reduction of the principal sum, and consequently in the purchase of the land. [JERVIS, C. J.—The case does not find that that which the party has already paid towards the purchase-money is worth 40*s.* a year in per petuity. MAULE, J.—Suppose a man agreed to stand in the claimant’s shoes,—would it be worth his while to give 40*s.* a year for his interest in the land? I think the case is governed by *Lee, app., Hutchinson*,

decisions, we must decide against him here. I see no reason to depart from the principle upon which those cases proceeded.

TALFOURD, J., concurred.

Decision affirmed, with costs.

*41] *NORTHAMPTONSHIRE,—Southern Division.

EDMUND SINGER BURTON and Another, Appellants; THOMAS BROOKS, Respondent. Nov. 13.

Where the case transmitted to the master under the 6 & 7 Vict. c. 18, ss. 42, 64, is not signed, as well as endorsed, by the revising barrister, the court will not hear the appeal, unless the respondent consents to the case being remitted to him for signature.

The minister of a dissenting congregation whose appointment, according to his own statement, was "general, and for life," occupied, by permission of the trustees, in whom the legal estate was vested, without paying any rent, a cottage and premises worth more than 40s. per annum. The revising barrister, considering that it was established, in point of fact, that the minister held the office and occupied the house and premises under the trusts of the deed, and therefore had such a freehold interest therein as entitled him to vote, retained his name on the list of voters:—Held, that he had come to a right conclusion.

THOMAS BROOKS, of Roade, in the county of Northampton, being on the list of electors for the southern division of the county of Northampton, in respect of his freehold interest in a house and garden at Roade, called the Chapel House, in his occupation, was duly objected to by Edmund Singer Burton.

It appeared that the said Thomas Brooks is the minister of a dissenting congregation at Roade aforesaid. The evidence of his appointment was, his own statement that *it was general, and for life*; and the following letter was produced:—

"Hartwell, May 21st, 1849.

"Dear Sir,—Yesterday we asked the subscribers to stop, as we had proposed; and, as far as we could ascertain, their feelings are in unison with those of the church members, in desiring to secure your stated ministrations at Roade. We have, therefore, now, on behalf of the church, to invite you to accept the pastorate, and come and reside amongst us. In this invitation we most cordially join. We trust the matter has been the subject of much prayer; and that your coming
*42] amongst us (if such should be the will of God) may be for His glory, and for great good. We remain, &c.

"WILLIAM HANDS, }
"WILLIAM JAMES, } Deacons.

"P. S.—Will you please to let us have your decision (as to next Sabbath) as early as possible, in order to afford time to get a supply, if one should be needed. Please to direct to Mr. Hands."

Upon receipt of this invitation, Mr. Brooks entered immediately upon the office of minister, which office he still fills, and took possession of the house and premises, with the consent of the trustees hereinafter named, and has continued in possession from that time to the present.

The house and garden are worth more than 40s. per annum.

The legal estate in fee in these premises was vested, by an indenture bearing date the 24th of July, 1844 (when one Samuel Deacon was minister), in certain trustees; and the trusts declared in respect thereof, so far as are material to the present purposes, are as under:—

“Upon trust, from time to time, and at all times thereafter, to permit and suffer the said Samuel Deacon, the then pastor, teacher, or minister of the said congregation of protestant dissenters called baptists, belonging to the said meeting-house, for and during his life, if he should so long continue pastor, teacher, or minister of the said congregation, and, after the death of the said Samuel Deacon, or his ceasing to be pastor, teacher, or minister of the said congregation, to permit and suffer the pastor, teacher, or minister of the said congregation for the time being,—such pastor, teacher, or minister to be from time to time elected and appointed by the majority of the persons of and belonging to the said congregation,—to *dwell, inhabit, and reside in the said cottage or tenement, and occupy and use the same, with the orchard, [*43 gardens, barns, stables, outhouses, yards, backsides, homestalls, and appurtenances thereto belonging, without paying any rent for the same: and upon this further trust, from time to time, and at all times thereafter, to permit and suffer the said congregation of protestant dissenters called baptists, whereof the said Samuel Deacon was then pastor, teacher, or minister, and every succeeding congregation of protestant baptist dissenters at Roade aforesaid, when and as often as they should think fit, to use the said erection and building erected and built on the said orchard as aforesaid, as or for a meeting-house or place for their assembling themselves together for the worship of God, according to the power, privilege, or indulgence given or granted to protestant dissenters by an act of parliament theretofore made, or by such other act or acts of parliament as should thereafter be made, and for their meeting and assembling themselves together there for the same worship, and for the well ordering and governing of the said congregation for the time being, or for any other lawful purposes, as often as the said congregation and their pastor, teacher, or minister for the time being, or the major part of them, should think fit.”

It was objected that Mr. Brooks, the respondent, under the circumstances above stated, did not take a freehold interest.

The revising barrister considered that it was established, in point of fact, that the respondent held the office of minister of that congregation, and occupied the house and premises under the trusts of the deed, and therefore he held that he *had* such a freehold interest in the premises as entitled him to vote.

If the court should be of a contrary opinion, then the register was to be amended, by striking out the name of the said Thomas Brooks.

**Humfrey*, for the appellant.—[JERVIS, C. J.—The revising [*44 barrister has *endorsed* the case, but he has omitted to *sign* it: we

have no authority to hear it.(a)] The other side will consent to waive the objection. [JERVIS, C. J.—That will not help you. I must make a return to the House of Commons of the decisions we come to upon these cases. Can I return that we have repealed the act by consent, and struck out a vote which would otherwise have been retained? MAULE, J.—The sheriff or other returning officer is not bound to alter the register in obedience to an order of this court, which has no other foundation than the consent of the parties. In the case of *Nettleton, app., Burrell, resp.*, 7 M. & G. 35 (E. C. L. R. vol. 49), 8 Scott, N. R. 738, 1 Lutw. Reg. Cas. 157, where the revising barrister had died leaving the case unsigned, we held that we could not remedy the defect. WILLIAMS, J.—The case may, by consent, be remitted to the barrister to be now signed.]

*45] *Hayes*, for the respondent, consenting that the case *should be signed *nunc pro tunc*, the court permitted the argument to proceed, on the assumption that it was already signed.

Humfrey.—The respondent was merely tenant at will of the cottage in question. The trusts of the deed under which he occupies the premises, are, “to permit and suffer the said pastor, teacher, or minister of the said congregation for the time being,—such pastor, teacher, or minister to be from time to time elected and appointed by the majority of the said congregation,—to dwell, inhabit, or reside in the said cottage or tenement, and occupy and use the same, with the appurtenances thereto belonging, without paying any rent.” In *Doe d. Nicholl v. M’Kaeg*, 10 B. & C. 721 (E. C. L. R. vol. 21), 5 Man. & R. 620, it was held by Lord TENTERDEN, and the Court of King’s Bench, that a minister of a dissenting congregation placed in the possession of a chapel and dwelling-house by certain persons in whom the legal estate was vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, was a mere tenant at will to those trustees; and that his tenancy might be determined instantaneously by a demand of possession. [WILLIAMS, J.—All that Lord TENTERDEN there says, might be said of one who had been let in under an agreement for a lease in fee. MAULE, J.—There is no finding in the case as to the tenure of office.] No: it is only found that Mr. Brooks, upon receipt of the

(a) The 42d section of the 6 & 7 Vict. c. 18, which gives the appeal, provides that the barrister, “if he thinks it reasonable and proper that such appeal should be entertained, shall state in writing the facts which, according to his judgment, shall have been established by the evidence in the case, and which shall be material to the matter in question; and shall also state in writing his decision upon the whole case, and also his decision upon the point of law in question appealed against; and such statement shall be made, as nearly as conveniently may be, in like manner as is now usual in stating any special case for the opinion of the Court of Queen’s Bench upon any decision of any Court of Quarter Sessions; and the said barrister shall read the said statement to the appellant in open court, and shall then and there sign the same.”

And s. 62 enacts “that every appellant who shall intend to prosecute his appeal, shall, within the first four days of Michaelmas Term next after the decision to which such appeal shall relate, transmit to the masters of the said Court of Common Pleas, the statement in writing so signed by the said revising barrister as aforesaid.”

invitation set out in the case, "entered immediately upon the office of minister, which office he still fills, and took possession of the house and premises, with the consent of the trustees, and has continued in possession from that time to the present." [MAULE, J.—What is the quantity of this man's estate?] A tenancy at will. [MAULE, J.—At law, no doubt, as the case you cite decides: but what in *equity?] [*46 A freehold, if for life. But the barrister does not find that he holds for life: he merely says that "he *considered* that it was established, in point of fact, that the respondent held the office of minister of that congregation, and occupied the house and premises under the trusts of the deed;" and *therefore* he held that he had such a freehold interest in the premises as entitled him to vote. [MAULE, J.—I think he was quite right. He finds, in effect, that the pastor was irremovable.]

JERVIS, C. J.—Upon the finding of the barrister, we must assume that the appointment of the minister was *for life*, under the trusts of the deed. He has, therefore, an equitable freehold for life, and is entitled to vote. The decision of the revising barrister must be affirmed.

The rest of the court concurring,

Decision affirmed, with costs.

***NORTHAMPTONSHIRE,—Southern Division. [*47**

**EDMUND SINGER BURTON, Appellant; BENJAMIN BLAKE
and Others, Respondents. Nov. 13.**

The court adjourned the hearing of an appeal, in order to give the appellant time to give the notice required by the statute 6 & 7 Vict. c. 18, ss. 42, 64,—the case not having been settled and delivered to the appellant until the eighth day of term.

Where the case transmitted to the master under the 6 & 7 Vict. c. 18, ss. 42, 64, is not *signed*, as well as endorsed, by the revising barrister, the court will not hear the appeal, where the respondent does not appear.

HENRY COVE claimed to have his name inserted in the list of county voters for the parish of St. Sepulchre, in the town of Northampton, in respect of an allotment to him of freehold land, as a member of a society called The Freehold Land Society.

Humfrey, for the appellant, upon the case being called on, prayed that the hearing might be adjourned, upon an affidavit which alleged that the statement of the case was not settled by the revising barrister until the 5th instant, and only delivered to the appellant on the 10th; and consequently there had not been time to give the notice required by the 6 & 7 Vict. c. 18, ss. 42, 64.

Per Curiam.—Let the appeal stand adjourned for ten days.

It being subsequently discovered that this case, like the last, was without signature, and no counsel appearing for the respondent,

Humfrey, for the appellant, submitted that the court had power to remit the case, under the 6 & 7 Vict. c. 18, s. 65, which contains a proviso, "that, if the said court [of Common Pleas] shall be of opinion in any case, that the statement of the matter of the appeal is *not sufficient* *to enable them to give judgment in law, it shall be lawful *48] for the said court to remit the said statement to the revising barrister by whom it shall have been signed, in order that the case may be more fully stated."

TALFOURD, J.—That only empowers the court to remit the case to the barrister "by whom it shall have been signed."

Appeal struck out.(a)

(a) In justice to the revising barrister, it ought to be stated, that, in this as well as in the preceding case, it was a copy only that was filed with the master.

END OF THE REGISTRATION CASES.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS.

IN
Trinity Term,

IN THE
FOURTEENTH YEAR OF THE REIGN OF VICTORIA. 1851.

The Judges who sat in Banco during this Term, were—

JERVIS, C. J.

CRESSWELL, J.

MAULE, J.

TALFOURD, J.

REGULA GENERALIS.

Easter Term, 1849.(a)

“IT IS ORDERED, that, where a rule for judgment as in case of a nonsuit shall have been discharged on a peremptory undertaking to try at the next or any future assizes or sittings, if the plaintiff shall make default in proceeding to trial pursuant to his undertaking, the defendant shall be at liberty, if the plaintiff has not *drawn up the rule, to draw it up at any time before moving for judgment, and there- [*50

(a) This rule was accidentally omitted.

upon to move for judgment, without serving a copy of the rule on the plaintiff.

(Signed)

“THOMAS WILDE.

“FRED. POLLOCK.

“J. PARKE.

“J. PATTESON.

“J. T. COLERIDGE

“T. COLTMAN.

“R. M. ROLFE.

“C. CRESSWELL.

“W. ERLE.

“T. J. PLATT.

“E. V. WILLIAMS.”

Read in court, April 29, 1849.

MEMORANDUM.

“At a meeting of the judges held at Serjeants’ Inn, on April the 16th, 1849, it was unanimously resolved, that, in all cases, mileage shall be allowed to an attorney attending an assize town, whatever the number of causes may be in which he is engaged, and that the charge in respect thereof shall be equally apportioned to each cause.”

*51] *STAINBANK and Another v. FENNING. May 30.

The master of a vessel has no authority to hypothecate, for money borrowed at a foreign port for necessary repairs and disbursements, and at the same time pledge the personal credit of his owner for such advances,—whether maritime interest be stipulated for or not.

A vessel having put into a foreign port in a damaged state, the master borrowed money of a merchant there, for necessary repairs and disbursements; to secure which, he drew bills upon his owner, and also executed an instrument which purported to be an hypothecation of the ship, cargo, and freight. By this instrument, the merchant who advanced the money forbore all interest beyond the amount necessary to insure the ship to cover the advances; and the master took upon himself and his owner the risk of the voyage, making the money payable at all events, and subjecting the ship to seizure and sale by virtue of process “out of Her Majesty’s high Court of Admiralty of England, or any court of Vice-Admiralty possessing jurisdiction at the port at which the said vessel might at any time happen to be lying, or to be, according to the maritime law and custom of England,” in the event of the bills being refused acceptance, or being dishonoured:—

Held, that, this not being such an hypothecation as could be enforced in the Court of Admiralty, —the payment of the money borrowed not being made to depend upon the arrival of the vessel, —the merchant had no insurable interest in the ship.

This was an action of assumpsit. The first count of the declaration stated that the plaintiffs, by and under the name, style, description, and

firm of C. Stainbank & Son, theretofore, to wit, on the 1st of December, 1846, according to the usage and custom of merchants, caused to be made a certain policy of insurance, purporting thereby and containing therein that the plaintiffs, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance, and cause themselves, and them, and every of them, to be insured, lost or not lost, at and from Quebec to a final port of discharge in the United Kingdom, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the Hartland, whereof was master George Hooper,—beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, upon the said ship, &c., and so *should continue and endure during her abode there, upon the said ship, &c., [*52 and, further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, should be arrived at (as above), upon the said ship, &c., until she had moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same should be there discharged and safely landed; and that it should be lawful for the said ship, &c., in the said voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, without being deemed a deviation, and without prejudice to the said insurance: the said ship, goods, and merchandises, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were and should be 1500*l.* *advances for repairs and disbursements*, and the whole valued at 1675*l.*, including premium of insurance: touching the adventures and perils which they, the assurers, were contented to bear, and did take upon them in that voyage, they were of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of marque and countermarque, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nature, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof: and, in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assignees, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, &c., and ship, &c., or any part thereof, without prejudice to that insurance; to the charges whereof they the assurers would contribute, each one according to the rate or quantity of his sum therein assured, &c., &c. *Averment, that the said policy of insurance [*53 and memoranda were so made by the plaintiffs as aforesaid as the agents of John Gilmour, David Gilmour, Allan Gilmour of Montreal,

James Gilmour, John Pollok, Arthur Pollok, Allan Gilmour of Glasgow, and Robert Rankin, and for their use and benefit, and that the plaintiffs did receive the order for and effect the said policy of insurance as such agents as aforesaid,—of all which premises, the defendant afterwards, to wit, on the 1st of December, 1846, had notice: that thereupon, in consideration that the plaintiffs, at the request of the defendant, had then paid to the defendant a certain sum of money, to wit, the sum of twenty guineas, as a premium or reward for the insurance of 200*l.* of and in the premises in the said policy of insurance mentioned, and had then promised the defendant to perform and fulfil all things in the said policy contained on the part and behalf of the insured to be performed and fulfilled, the defendant then promised the plaintiffs that he would become and be an insurer to the plaintiffs of the said sum of 200*l.* upon the premises in the said policy of insurance mentioned on his part and behalf, as such insurer of the said sum of 200*l.*, to be performed and fulfilled; and the defendant then became and was an insurer to the plaintiffs, and then duly subscribed the said policy of insurance as such insurer, for the sum of 200*l.*, upon the premises in the said policy in that behalf mentioned: that the said John Gilmour, David Gilmour, Allan Gilmour of Montreal, James Gilmour, John Pollok, Arthur Pollok, Allan Gilmour of Glasgow, and Robert Rankin, some or one of them, were or was then, and from thence continually afterwards until and at the time of the loss thereafter mentioned, interested in the premises in the said policy of insurance and memoranda mentioned, to a large amount, to wit, to the value and amount of all the moneys by them ever insured or *54] caused to be insured *thereon: and that theretofore, to wit, on the 25th of November, 1846, the said ship or vessel departed and set sail from Quebec aforesaid, on her said voyage, to a final port of discharge in the United Kingdom, to wit, Bristol; and that afterwards, and while the said vessel was proceeding on her said voyage, and before her arrival at any final port of discharge in the said writing or policy of insurance mentioned, to wit, on the 27th of November, 1846, the said vessel was, by the perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the winds and waves, driven on the shore, and thereby, and by means of the premises, became bulged, broken, &c., and the said ship then became and was wholly lost, and thereby the premises upon which the defendant became and was an insurer as in the said policy mentioned, to wit, the said 1500*l.* *advances for repairs and disbursements*, became wholly lost,—of all which premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiffs to pay them the said sum of 200*l.* so insured by him as aforesaid, and which said sum of 200*l.* he, the defendant, ought to have paid, according to the form and effect of the said policy of insurance and his said promise and

undertaking so by him made as aforesaid: yet that the defendant had disregarded his promise, &c., &c.

The defendant pleaded,—first, non assumpsit,—secondly, that the said policy so made by the plaintiffs was not made by them as agents for the said persons in the said first count in that behalf mentioned, for their use and benefit, in manner and form as therein alleged,—thirdly, that the said persons in the said first count in that behalf alleged, were not, nor were nor was any or either of them interested in the premises in the said policy and memoranda mentioned, in manner and form as in the first count in that behalf alleged,—fourthly, [*55 *that the said ship was not lost, in manner and form as in the said first count in that behalf alleged,—fifthly, that the premises upon which the defendant became and was an insurer, as in the said policy and first count in that behalf mentioned, were not, nor was any part thereof lost, in manner and form as in the said first count in that behalf alleged.

Upon these pleas issues were joined.

The cause was tried before PLATT, B., at the Spring Assizes at Liverpool, in 1850, when the following facts appeared in evidence:—On the 20th of September, 1846, the Hartland sailed from Quebec for Bristol. Having sustained sea damage, she put back to Quebec a few days after for repairs, to effect which, and for the necessary disbursements of the ship, the master borrowed of Allan Gilmour & Co. 1675*l.* 11*s.* 6*d.*, drawing upon William Hooper, his owner, in their favour, for 1307*l.* 12*s.* 1*d.*, and upon Messrs. Mead & Son, the owners and consignees of the cargo, for 367*l.* 19*s.* 5*d.*; and also giving to Allan Gilmour & Co. an instrument of hypothecation in the terms hereinafter set out.

The Hartland again sailed for Bristol on the 25th of November, 1846, and on the following day she went on shore in the St. Lawrence, where she remained until the following April, when she was got off, and taken to Quebec. She was then surveyed, and was found to be so much damaged that a prudent owner uninsured would not have repaired her,—the estimated cost of repairing her exceeding the sum she would have been worth when repaired. Notice of abandonment was given to the underwriters, first on the 28th of February, 1847, as soon as the assured received notice that the vessel was on shore, and again on the 17th of June, which was the day after the receipt by the Liverpool house of the letter containing an intimation of the ship's condemnation and sale, under the authority of the Admiralty Court at *Quebec, [*56 and which letter had been transmitted from Quebec by the first packet after the 15th of May, when the survey was made.

The instrument of hypothecation executed by the master was as follows:—

“To all to whom these presents shall come, I, George Hooper, the master and commander of the barque or vessel called the Hartland, of

Biddeford, of the burthen of 487 tons, or thereabouts, at present lying in the harbour of Quebec, send greeting: Whereas, the said barque, the Hartland, on the prosecution of her voyage from Quebec to Bristol, with a timber cargo, did, on the 20th of September last, strike in the traverse, and then fell over on her broadside, and sustained such serious damage and loss that the said George Hooper thought proper to put back to Quebec for repairs; which was accordingly done; and, having required the advance of a certain sum of money to defray the expenses of steamboat hire, discharging the cargo of said vessel, and repairing her, replacing the articles lost, reloading, and expenses for other necessities, without which the said vessel could not proceed on her intended voyage to Bristol aforesaid, I, the said George Hooper, did apply to John Gilmour and David Gilmour, of Quebec, in Canada, Allan Gilmour, and James Gilmour, of Montreal, in Canada, John Pollok, Arthur Pollok, and Allan Gilmour, of Glasgow, in Scotland, and Robert Rankin, of Liverpool, in England, merchants, carrying on business at Quebec, under the name and style of Allan Gilmour & Co., to advance me the sum required for the purposes aforesaid; which they the said Allan Gilmour & Co. agreed to do, on condition of their being secured the repayment thereof by an hypothecation of the said ship, her cargo, and the freight; and the said Allan Gilmour & Co. have accordingly, before the execution of these presents, advanced and paid unto me, the said George Hooper, the

*57] *sum of 1547*l.* 6*s.* 7*d.* current money of this province,—equal, at the current rate of exchange, to the sum of 1307*l.* 12*s.* 1*d.* of lawful money of Great Britain, on the credit and account as well of the said barque or vessel as of the owner thereof described in the register, of which a true copy is inserted in these presents: And I, the said George Hooper, have accordingly this day delivered to the said Allan Gilmour & Co. one set of triplicate bills of exchange, bearing even date herewith, drawn by me, the said George Hooper, on William Hooper, of Biddeford, in the county of Devon, gentleman, for the said sum, payable to the said Allan Gilmour & Co., or to their order, in London, for value received on account of the said barque or vessel the Hartland, at ninety days' sight: And whereas the said Allan Gilmour & Co. advanced to the said George Hooper, previous to the sailing of the said barque from Quebec as aforesaid, for general disbursements of the said barque or vessel the Hartland, comprising the charges of pilotage, seamen's wages, a good and sufficient crew, provisions, and other necessities, &c., and without which the said vessel could not have proceeded to sea, the sum of 410*l.* 1*s.* 1*d.* sterling, and for which a bill of exchange was granted by me on Messrs. R. Mead & Son, of Frome, in Somersetshire, the consignees or owners of the cargo on board of the said barque,—the sum so drawn being on account of the freight to which the cargo was liable, and would become due by the said R. Mead & Son on the delivery of the cargo at its destination: And whereas, owing to

the accident aforesaid, the said George Hooper requested the said Allan Gilmour & Co. not to remit the said bill, and that he would secure them the payment of the said disbursements, by an hypothecation as aforesaid on the said vessel and freight, the said disbursements being incurred on account of the said ship, and would grant other bills for the same, less pilotage and sundry seamen's notes not paid, and deducted from the said disbursements, *amounting to 42*l.* 1*s.* 8*d.* [*58 sterling, leaving a balance due on the said bill for disbursements, of 367*l.* 19*s.* 5*d.* sterling; which bill of 410*l.* 1*s.* 1*d.* sterling was this day cancelled, and another granted, for the said sum of 367*l.* 19*s.* 5*d.* sterling, upon the said R. Mead & Son, at ninety days, the same being also drawn on account of the freight of the cargo addressed and consigned by bills of lading to the said R. Mead & Son. Now, know ye, that, for the effectually securing to the said Allan Gilmour & Co. the due and punctual acceptance and payment of the said bills of exchange so drawn by me, the said George Hooper, one of which, on the said William Hooper, for the said sum of 1307*l.* 12*s.* 1*d.*, and the other on the said R. Mead & Son, for the said sum of 367*l.* 19*s.* 5*d.*, for the causes and in the manner aforesaid, I, the said George Hooper, *have pledged, mortgaged, and hypothecated, and by these presents do* (as master of the said barque or vessel called the Hartland, and in the said capacity as master, by virtue of all other powers and authorities whatsoever me thereunto in anywise enabling), *pledge, mortgage, charge, and hypothecate the said barque or vessel, the Hartland, her tackle, apparel, and furniture, and the freight of the said vessel, and every part thereof*, to the said Allan Gilmour & Co., their executors, administrators, and assigns, but including, with respect to the said bill on the said William Hooper, the cargo on board the said barque or vessel,—the said expenses being incurred for the benefit of the said ship, freight, and cargo: And I, the said George Hooper, as such master as aforesaid, do hereby grant, testify, and declare, that, in case the said bills of exchange shall be refused acceptance or payment, or be otherwise dishonoured, or not duly and punctually accepted and paid by the said William Hooper and the said R. Mead & Son, on presentment for the said purposes, according to the tenor and effect thereof, it shall and may be lawful to and for the said Allan Gilmour & Co. forthwith to seize and take possession of the *said barque the Hartland, and to cause the same to be [*59 sold and disposed of, either by virtue of process to be issued out of Her Majesty's high court of Admiralty of England, or any court of Vice-Admiralty possessing jurisdiction at the port at which the said barque or vessel may at any time thereafter happen to be lying, or to be, according to the maritime law and custom of England: And I, the said George Hooper, as such master as aforesaid, do by these presents testify, declare, and make known, that I took up and borrowed of the said Allan Gilmour & Co. the said sums of money on the credit and

account of the owner of the said barque the Hartland, and do hereby, so far as in me lies, as master as aforesaid, grant and declare that it shall and may be lawful to and for the said Allan Gilmour & Co. to place the same to the debit and account of the owner of the said barque; and, in case of the non-acceptance or non-payment of the said bills of exchange, the said Allan Gilmour & Co. shall and lawfully may have, use, and take all such lawful ways and means whatsoever for the recovery of the said sum of money, or such part or parts thereof as may at any time or times hereafter remain due or unpaid, as merchants or other persons in a foreign port, or other port out of the kingdom of Great Britain, advancing money at the instance of a master of a ship or vessel, for the repairs, outfits, and disbursements thereof, to enable such ship or vessel to proceed on her homeward bound voyage, on the credit and account of such ship or vessel and her owner, can or lawfully may have, use, or take for the recovery thereof against such ship, or her owner or master: And I, the said George Hooper, for myself, my executors, administrators, and assigns, do hereby covenant, promise, and agree to and with the said Allan Gilmour & Co., their executors, administrators, and assigns, in manner and form following, that is to say, *60] that I, the said George Hooper, my *executors and administrators, shall and will at any time or times hereafter, when thereunto required by the said Allan Gilmour & Co., make, do, and execute all and every such further or other act and acts, deed and deeds, thing and things, instrument, and assurances in the law, whatsoever, for the further, better, and more effectually hypothecating and charging the said barque or vessel the Hartland, and her apparel and furniture, and the freight and cargo of the said vessel, and every part thereof, with the payment of the said sums of money, as by them the said Allan Gilmour & Co., their counsel, attorneys, solicitors, proctors, or agents, shall or may be devised, advised, or required; which said barque or vessel has been duly registered, a copy of which, with a view of identifying the owner, and in compliance with the requirements of the law, is herein transcribed, that is to say [setting out the register, showing that the vessel had already been mortgaged to one William Buse]: And it is declared and agreed by and between me, the said George Hooper, and the said Allan Gilmour & Co., that, inasmuch as the said Allan Gilmour & Co. forbear any claim by way of a premium or maritime interest upon the risk of the said sums of money so advanced as aforesaid, that the voyage of the said barque shall be at the sole risk and peril of the owner of the said barque or vessel the Hartland, and that therefore, whether the ship arrive in safety or not, or in the event of shipwreck or loss of the same by the Act of God, accident, or the Queen's enemies, the said sums shall, in either or in any case, be recoverable and be paid by the owner of the said barque to the said Allan Gilmour & Co., or to their order, as aforesaid, together with such

further sum or sums of money as they may pay or lay out in causing the said barque or her freight to be insured, should they think proper so to do, in an amount sufficient to cover the advances by them made as aforesaid, and which *insurance the said Allan Gilmour & Co., [*61 by these presents, by me, the said George Hooper, are authorized and empowered to cause to be done and made, and to charge the same to me and the owner of the said barque: And it is further agreed and declared, that the said Allan Gilmour & Co. shall and will have all the rights, privileges, and remedies, by process of the courts of Admiralty and otherwise, which by law are given to the holders of bottomry-bonds, anything herein contained to the contrary notwithstanding: And, lastly, it is agreed and declared that the said vessel, her tackle, apparel, furniture, and her freight and cargo, shall at all times hereafter be chargeable and liable for the payment of the said sums of money advanced to enable the said barque to proceed on her voyage, and the costs of insurance as aforesaid, unto the said Allan Gilmour & Co., their executors, administrators, and assigns, according to the true intent and meaning of these presents. In faith and testimony whereof, I, the said George Hooper, the master and commander of the said barque or vessel called the Hartland, have to these presents, and to an exact duplicate and triplicate,—one of which being paid, the others are to be null and void,—set my seal, and subscribed my name and signature, at the city of Quebec, in the province of Canada, this 18th of November, 1846.

“GEORGE HOOPER (L. S.)

“Signed, sealed, and delivered, at Quebec, }
(where no stamps are used) in our presence, }

“A. BELANGER, of
Quebec, Notary,

“O. F. CAMPEAN, of
Quebec, Notary.

“*In testimonium veritatis*, ARCH. CAMPBELL, Her Majesty's notary, and notary public.”

*Appended to this instrument was a notarial certificate of its [*62 due and formal execution.

On the part of the defendant, it was insisted,—first, that the assured had no insurable interest, the subject-matter of the insurance being merely a debt; citing *Manfield v. Maitland*, 4 B. & Ald. 582 (E. C. L. R. vol. 6), and *Palmer v. Pratt*, 2 Bingh. 185 (E. C. L. R. vol. 9), 9 J. B. Moore, 358 (E. C. L. R. vol. 17),—secondly, that the master had no power to mortgage the ship, though he might have raised money by bottomry or respondentia; *Thomson v. The Royal Exchange Assurance Company*, 1 M. & Selw. 30; 8 & 9 Vict. c. 99,—thirdly, that, if the master *had* power to mortgage the ship, the plaintiffs were the owners; whereas, the insurance was not upon the ship, in which case there

would have been benefit of salvage,—fourthly, that the notice of abandonment was too late.

For the plaintiffs, *Briggs v. The Merchant Traders' Ship, Loan, and Assurance Association*, 18 Law Journ., N. S., Q. B. 178, was cited, and it was submitted that immediate notice of abandonment was not necessary, and that here the notice had been given within a reasonable time.

A verdict was taken for the plaintiffs, damages 200*l.*, subject to leave reserved to the defendant to move to enter a nonsuit upon the above points; and subject to a reduction of the verdict, if the court should be of opinion that the plaintiffs were entitled to recover for an average loss only.

W. H. Watson, in Easter term last, moved to enter a nonsuit. —There was evidence to warrant the jury in coming to the conclusion that there had been a constructive total loss of the ship. The propriety of the finding, therefore, will not be disputed. But it is submitted, that, here, the assured had no insurable interest; and that, if they had, it is not well described in this policy.

*63] *1. The subject-matter of the insurance is not a maritime risk; it is a mere debt, which is to be recoverable notwithstanding the vessel may be lost: consequently it is not an insurable interest. It has long been settled, that, in the case of bottomry, there cannot be a constructive total loss: *Thomson v. The Royal Exchange Assurance Company*, 1 M. & Selw. 30. [CRESSWELL, J.—What is the nature of the interest granted to Gilmour & Co. by the instrument in question?] The question is, whether it is hypothecation or a mortgage. [CRESSWELL, J.—What is the difference between the two?] The Admiralty Court has no power to determine title: it can only deal with cases of hypothecation: *Com. Dig. Admiralty*; *Vin. Abr. Hypothecation*. [CRESSWELL, J.—What is hypothecation? I have always understood it to mean *pledge*.] That is not the true definition. The master of a ship may, in case of necessity, borrow money upon his owner's credit; he may hypothecate the ship and freight; or he may sell a part of the cargo: but he cannot, properly, mortgage the ship. This matter is very elaborately discussed by Lord STOWELL, in the case of *The Gratitude*, 3 Ch. Rob. Adm. Rep. 240. [CRESSWELL, J.—You must not assume this to be a mortgage.] If it be hypothecation, then there has been no total loss. In *Bridgeman's case*, Hobart, 11, Philip Bridgeman sued one Williams in the Admiralty Court, and the case was this,—that one Philip Bernard was owner of a ship called the *Bonaventure*, and sent her into Spain, and made Williams master of her, who (as is alleged in the Admiralty Court) did upon the high sea borrow of Bridgeman certain royals of eight, to the value of 50*l.*, for repayment whereof he did impawn the said ship, and, returning now home, and the ship lying in the Thames, Bridgeman obtained a warrant from the Admiralty Court

to arrest the same ship, and did so; *whereupon Bernard came [*64 into the Admiralty Court, and claimed his property, denying that the said Williams was owner, or had any power to pawn it; yet, nevertheless, the court proceeded to judgment against the ship for his debt: whereupon a prohibition was granted by the court; when one of the reasons was,—that, by the common law, by which properties were to be tried, the master of the ship could not impawn the ship, for, no property, general nor special, nor such power, is given unto him by the constituting of him master. But the chief justice “was of opinion clearly that the Admiral law is reasonable, that, if a ship be at sea, and take leak, or otherwise want victual or other necessaries, whereby either herself be in danger, or the voyage defeated, that, in such case of necessity, the master may impawn for money or other things to relieve such extremities, by employing the money so: for, he is the person trusted with the ship and voyage, and therefore reasonably may be thought to have that power given to him implicitly, rather than to see the whole lost.” In *Scarreborrow v. Lyrius*, Noy, Rep. 95, Latch, 252, *per nom.* *Scarborough v. Justus Lyrus*, “L. being in a ship upon the sea, B., who was in it, was reputed an agent and factor, borrows 100*l.* upon bottomage,—that is, when the money is paid upon the keel of the ship, and the ship obliged to the payment of it; and, if it be not paid at the time, &c., that he that lends the money shall have the ship. And that was allowed to be a good and necessary custom, by all. And it was agreed by the justices, that, if the master, factor, purser, or he that is reputed owner of the ship, borrows money in such a manner, for the necessaries of the ship, that binds the owner of the ship, although the money be not so employed in truth: and the owner hath his remedy against him that he so put in trust; and it is not a good allegation, for to have a prohibition, to say that the *property was not in him [*65 that took such bottomage.” [JERVIS, C. J.—Is it an essential ingredient, to give the lender an insurable interest in the ship, that the Admiralty Court should have jurisdiction?] It is submitted that it is. The master’s authority extends to the sale of the ship, in case of absolute necessity,—*Hunter v. Parker*, 7 M. & W. 322:† but it has never been held that he may mortgage her, even to raise money for necessary repairs. In *Johnson v. Shippen*, 2 Ld. Raym. 982, 1 Salk. 35, Lord HOLT says that the master of a ship can have no credit abroad, but upon giving security by hypothecation. The case of *The Atlas*, 2 Hagg. Adm. Rep. 48, shows that the court of Admiralty will not take cognisance of an hypothecation bond which is not made dependent upon the accidents of the voyage. *Samsun v. Braggington*, 1 Ves. sen. 443,(a) which seems to be inconsistent with this argument, is neither intelligible nor satisfactory. There are many cases to show that advances, which constitute a mere debt, do not create an insurable

(a) Cited in *Abbott on Shipping*, 7th edit. p. 166.

interest: see *Wilson v. The Royal Exchange Assurance Company*, 2 Campb. 626; *Manfield v. Maitland*, 4 B. & Ald. 582 (E. C. L. R. vol. 6); *Palmer v. Pratt*, 2 Bingh. 185 (E. C. L. R. vol. 9), 9 J. B. Moore, 358 (E. C. L. R. vol. 17): in such case, the insurance would be upon the solvency of the owner.

2. Assuming this to be a mortgage, and that the master had authority, the proper mode of insuring would have been, to insure the ship, or the mortgagees' interest therein.

Supposing both these points to fail, then it is submitted, on the authority of *Knight v. Faith*, 19 Law Journ., N. S., Q. B. 509, that *66] there was *no sufficient notice of abandonment. [WILLIAMS, J., referred to *Fleming v. Smith*, 1 House of Lords Cases, 513.]

A rule nisi having been granted,

Knowles and Atherton, on a subsequent day in the same term, showed cause.—1. The real question between the parties is, whether the plaintiffs had an insurable interest: and this depends upon the language of the deed of the 18th of November, 1846, which, it is submitted, does give the parties whom the plaintiffs represent an insurable interest in the ship. In form, the instrument is not a bottomry bond; bottomry risk and bottomry interest are excluded: but the obvious intention of the parties, is, that the lenders shall have an interest in the ship, provided the bills should be refused acceptance, or should be dishonoured. The instrument, it is true, provides that the voyage shall be at the sole risk of the owner: but that must be taken in connexion with that which accompanies it. The master's authority to take up money for the necessary repairs and disbursements of the ship, is not so limited as is suggested: neither does hypothecation necessarily mean bottomry; though that is one form of it. In *Abbott on Shipping*, 8th edit. p. 366, it is said: "Hypothecation imports a pledge without immediate change of possession; it gives a right to the party who makes advances upon the faith of it, to have the possession, if his advances are not repaid at the stipulated time: but it leaves to the proprietor of the things that may be hypothecated, the power of making such repayment, and thereby freeing them from the obligation. It is, therefore (as hath *67] been before observed,—p. 154), contrary to the nature of this *proceeding, and consequently contrary to the duty, and beyond the power, of the master, to engage that the lender shall at all events have the goods delivered at their place of destination to him or his agents, to be there sold and disposed of by him or them, without reserving the right of redemption to the merchant; and such an engagement will not be obligatory upon the merchant; but he will still have the right to take his goods, upon payment of the money for which they may have been engaged." What authority is there for contending that the master is limited to a bottomry security alone? Lord TENTERDEN recognises as valid instruments which not only hypothecate the ship

and cargo, but also give the personal security the owner. "The name of bottomry," he says, (a) "has been sometimes incorrectly applied to a contract by the terms of which the ship itself is not pledged as a security, but the repayment of the money, with a high premium for the risk, is made to depend upon the success of a voyage. This is rather a loan upon a particular adventure to be made by a particular ship, than a loan upon the ship; and, of course, the lender has only the personal security of the borrower for the due performance of the contract. And it seems that loans have sometimes been made in this manner, and probably also with a pledge of the ship itself, to an amount exceeding the value of the borrower's interest in the ship; and such a contract is still legal in this country, in all cases except the case of ships belonging to the King's subjects, bound to or from the East Indies." Again, that learned author says, (b)—"With regard to a *foreign country*, the rule appears to be, that, if the master of a vessel has occasion for money to repair or victual his ship, or for any other purpose necessary to enable him to complete the enterprise in which she is engaged, *whether [*68 the occasion arises from any extraordinary peril or misfortune, or from the ordinary course of the adventure, he may, if he cannot otherwise obtain it, borrow money on bottomry at maritime interest, and pledge the ship, and the freight to be earned in the voyage, for repayment at the termination of the voyage. When this is done, the owners are never personally responsible. The remedy of the lender is against the *master* or the ship. But, if the person who thus advances money does not choose to take upon himself the risk of the ship's return, and will be content not to demand maritime interest, there seems to be no reason why the master should not pledge both the ship itself and the personal credit of the owner. And in a case which came before Sir JOHN STRANGE, M. R., wherein a man who had advanced money to refit a ship in distress at Jamaica, and had taken from the master both a deed of hypothecation of the ship, and bills of exchange upon the principal owner in England for the amount of the sum advanced, claimed payment of the owners personally, the ship having been captured on her voyage home; it was decreed that he should recover the money; and it is said also that the ship was thought to be well hypothecated,"—*Samsun v. Braggington*. That is a distinct authority. [JERVIS, C. J.—The report of *Samsun v. Braggington* is not very satisfactory.] The case of *The Atlas*, 2 Hagg. Adm. Rep. 48, where Lord STOWELL refused to give effect to an instrument like this, has been relied on. But there are cases where the Admiralty Court has separated the good from the bad part of the instrument. Lord STOWELL in that case says: "This court has certainly an established jurisdiction over bottomry bonds, properly so called: such bonds are founded upon sea-risk, and are defeasible by the destruction of the ship in the course of

(a) Abbott, 8th edit. p. 151.

(b) Page 156.

*69] *the voyage, on which account alone the high interest is allowed, and is supported by the established course of this maritime jurisdiction: but *this* bond is not defeasible by any such casualty: whether the ship sinks or swims, whether she arrives at her destined port or is lost in the ocean, it makes no real difference in the bond; for, the debt with the accompanying interest remains in full force, and is only slightly affected, as to the time of payment, by the event of a total loss: the hypothecation goes no further, and would not go so far, if not compelled by the necessity of the later intelligence, which must be received after the actual loss of a ship. The bond is absolute without any dependence whatever upon the accidents of the voyage; the debt and the interest thereon must, under any event whatever, be discharged. I therefore entertain a very serious doubt whether, in proceeding upon such a bond, I might not subject this court to the hazard of prohibition. The allowance of 12 per cent., which in this bond is permitted to be exacted in all cases, whether of a successful or an unfortunate voyage, is not a *periculi pretium*, for, danger there is none. The bond, then, being the foundation of the suit, is the first object of attention: and it would be imprudent to proceed further upon it till this doubt is clearly removed." Ultimately, the bond was held to be void. The case of *The Tartar*, 1 Hagg. Adm. Rep. 1, more closely resembles the present. [JERVIS, C. J.—The statute of 19 G. 2, c. 37, s. 5, expressly provides that the money shall be borrowed on the ship alone.(a)] In the case of *The Tartar*, a bottomry bond given by a master to the foreign merchant who appointed him, "binding the owners of the ship," and endorsed "as a collateral security for bills of exchange," was pronounced valid: *70] *and it was held that a partial defect in the bond did not necessarily invalidate it altogether. The same thing nearly is laid down in the case of *The Nelson*, 1 Hagg. Adm. Rep. 169, where Lord STOWELL says: "To the bond exhibited here, some objections are taken respecting its form, but not affecting its validity. One objection is, that it binds the owners personally, as well as the ship and freight, which it cannot do. That is held in this court to be no objection to the efficacy of what it is admitted it can do. Here, we do not take this bond *in toto*, as is done in other systems of law, and reject it as unsound in the whole, if vicious in any part. But we separate the parts, reject the vicious, and respect the efficiency of those which are entitled to operate. The form of these bonds is different in different countries; so is their authority. In some countries, they bind the owner or owners, in others, not; and, where they do not, though the form of the bond affects to bind the owners, that part is insignificant, but does not at all touch upon the efficiency of those parts which have an acknowledged operation." [JERVIS, C. J.—What is *this* instrument?] It is an instrument of hypothecation. General convenience

(a) That statute applies only to voyages to the East Indies.

has led to the adoption of one form of hypothecation. But, where the lender is disposed to take less than the maritime interest, there is no reason why he may not have the owner's personal security. There is no authority to show that a bond in this form is bad. In *Simonds v. Hodgson*, 3 B. & Ad. 50 (E. C. L. R. vol. 23), an instrument executed in a foreign port, by the master of a ship, reciting that his vessel, bound to London, had received considerable damage, and that he had borrowed 1077*l.* to defray the expenses of repairing her, proceeded as follows:—"I bind myself, my ship, her apparel, tackle, &c., as well as her freight and cargo, to pay the above sum, with 12 per cent. bottomry *premium; and I further bind myself, said ship, her freight, [*71 and cargo, to the payment of that sum, with all charges thereon, in eight days after *my arrival* at the port of London; and *I do hereby make liable the said vessel, her freight, and cargo, whether she do or do not arrive at the port of London*, in preference to all other debts or claims, declaring that this pledge or bottomry has now, and must have, preference to all other claims and charges, until such principal sum, with 12*l.* per cent. bottomry premium, and all charges, are duly paid:" and it was held, upon error, that this was an instrument of bottomry, for, an intention sufficiently appeared from the whole of it, that the lender should take upon himself the peril of the voyage; that the words *my arrival* must be understood to mean *my ship's arrival*; and that the words "I make liable the said vessel, her freight, and cargo, whether she do or do not arrive at London," were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, and not to provide for the event of a loss of the ship. Lord TENTERDEN there says: "Instruments of bottomry are in use in all countries wherein maritime commerce is carried on. The lender of the money is entitled to receive a recompense far beyond the rate of legal interest: this recompense is very properly called in the civil law '*periculi pretium*,' and of course no person can be entitled to it who does not take upon himself the peril of the voyage: but it is not necessary that his doing so shall be declared expressly, and in terms, though this is often done: it is sufficient that the fact can be collected from the language of the instrument in all its parts." The term "hypothecation" is commonly used as synonymous with pledge: see *Bridgeman's case*, Hobart, 11; *Scarreborrow v. *Lyrius*, Noy, Rep. 95, *Scarborough v. Justus Lyrus*, Latch, 252, [*72 *Cossart v. Lawdley*, Comb. 135, 3 Mod. 244, Holt, 48. Every contract for the benefit of the ship implies hypothecation: *Justin v. Ballam*, 2 Ld. Raym. 805, 1 Salk. 34; *Abbott on Shipping*, p. 142. It is not essential to hypothecation that the payment of the money should be contingent on the arrival of the vessel, unless maritime interest is taken; though maritime risk may be essential to one kind of hypothecation, viz., bottomry. The court cannot fail to discover upon

the face of this instrument, that the intention of the parties was hypothecation: the very term "hypothecate" is used more than once. [JERVIS, C. J.—The words *pledge*, *mortgage*, and *hypothecate*, all are used.] It is not contended that the master has power to mortgage the ship. [WILLIAMS, J.—Upon an instrument of hypothecation, there is a remedy in the Admiralty Court. But, by the law of England, is it possible to charge a chattel, without giving the possession by way of lien?] It is not the law of England that is relied on, but the maritime law so far as it is incorporated in it. In *Hill v. Secretan*, 1 B. & P. 315, A., being indebted to B., without any order from him, consigned goods to C., to be held for B., and endorsed the bill of lading to C.: it was held that B. had an insurable interest in the goods so consigned. The definition of an "insurable interest," adopted by Mr. Arnould in his treatise on Insurance, Vol. 1, p. 230, is that given by LAWRENCE, J., in *Lucena v. Craufurd*, 2 New Rep. 302. "Interest," he says, "does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to *produce a damage, detriment, or prejudice to the person insuring: and, where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction." Here, the plaintiffs' principals clearly had an insurable interest, within that definition, viz., an interest in the ship and cargo, defeasible, of course, on the bills being paid.

2. The next question is, whether the interest is well described in the policy. It is difficult to conceive what other description could have been adopted. The words are,—“The said ship, goods, and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be 1500*l.*, advances for repairs and disbursements, and the whole valued at 1675*l.*, including premium of insurance.” What is that but an insurance upon the ship? [JERVIS, C. J.—With an interpretation clause.] Exactly so. *Manfield v. Maitland*, 4 B. & Ald. 582 (E. C. L. R. vol. 6), was the case of an insurance on money lent. *Palmer v. Pratt*, 2 Bing. 185 (E. C. L. R. vol. 9), 9 J. B. Moore, 358 (E. C. L. R. vol. 17), is equally inapplicable: the instruments described in the policy there were not bills at all. [CRESSWELL, J.—If this was a case of hypothecation, why was not possession taken of the ship?] She never arrived, in point of law. [CRESSWELL, J.—Do you put it higher than a sale by the master under justifiable circumstances?] No. The surveys and other evidence

showed that the vessel was not worth repairing,—which constitutes a total loss within all the authorities: *Roux v. Salvador*, 3 N. C. 266, 4 Scott, 1; *Knight v. Faith*, 19 Law Journ. N. S., Q. B. 509.

*As to the notice of abandonment, if any were necessary, it was here given within a reasonable time, which is all that the law [*74 requires: *Gernon v. The Royal Exchange Assurance*, 6 Taunt. 383 (E. C. L. R. vol. 1).

W. H. Watson and Tomlinson, in support of the rule.—1. The plaintiffs in this case had no insurable interest. “Advances for repairs and disbursements” clearly do not, independently of contract, constitute such an interest. The master of a ship has no lien upon the ship for repairs,—*Hussey v. Christie*, 9 East, 426; or for wages,—*Smith v. Plummer*, 1 B. & Ald. 575: and a third person advancing money for those purposes could be in no better position than the master: it would be a mere personal debt, which is not the subject of insurance: *Palmer v. Pratt*, *Manfield v. Maitland*, *Winter v. Haldiman*, 2 B. & Ad. 649 (E. C. L. R. vol. 22), *Siffken v. Allnutt*, 1 M. & Selw. 39. [CRESSWELL, J.—The question is, whether it is an insurance on the ship in respect of the advance, or an insurance of the debt.] The plaintiffs have failed to produce an instance of such an instrument as this, save the case of *Samsun v. Braggington*, the whole value of which depends upon its citation in *Abbott on Shipping*, and which, after all, is no decision upon the point. The only instruments to which the term “hypothecation” is applied by all writers on maritime law, are, bottomry and respondentia. Courts of Admiralty do not so much regard the form of the instrument. Dealing with the substance, they assume jurisdiction, if the payment is contingent on the arrival of the ship: otherwise they decline it: *Case of The Rhadamanthe*, 1 Dodson’s Adm. Rep. 201. By the maritime law, it is essential that the money should *be in jeopardy,—that the lender should bear the risk of the par- [*75 ticular voyage. The master’s power is, to pledge the bottom of the ship. In case of deviation, or barratry and abandonment of the voyage, the money may be recovered back. The passage cited from 1 Salkeld, 34, cannot be accurate. [JERVIS, C. J.—To constitute an insurable interest, must it not be an absolute indefeasible interest?] Unquestionably it must. In *Camden v. Anderson*, 5 T. R. 709, two partners purchased a ship, under a bill of sale conformable to the statute 26 G. 3, c. 60: afterwards, they took in two other partners, but there was no transfer of the ship to them jointly with the others: it was held that the four partners had not an insurable interest in the freight of the ship. A man cannot insure freight, unless he is owner of the ship: he cannot insure expectant freight; but only where the goods are actually shipped, or are upon the point of shipment. In *Stockdale v. Dunlop*, 6 M. & W. 224,† *H. & Co.*, being owners of two ships, called *The Antelope* and *The Maria*, trading to the coast of Africa, and which

were then expected to arrive in Liverpool with cargoes of palm-oil, agreed *verbally* to sell to the plaintiffs two hundred tons of oil,—one hundred tons to arrive by The Antelope and one hundred tons to arrive by The Maria. The Antelope did afterwards arrive with one hundred tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The Maria, having fifty tons of palm-oil on board, was lost by perils of the sea. The plaintiffs having insured the oil on board The Maria, together with their expected profits thereon,—it was held that they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced. Lord ABINGER there said: “The cases of freight are not analogous to cases of insur-
 *76] rances on the profits to arise *from the sale of goods. They stand upon the assumption that the party assuring has in his own power the subject-matter upon which the insurance is effected. In this case the plaintiffs had no present interest, and none can attach on such a contract as this.” The first object of this instrument, is, to obtain at all events the security of the owner’s personal liability; the second is, to effect a pledge or mortgage of the ship; the third, to confer a jurisdiction upon the Admiralty Court to deal with the vessel as in a case of bottomry. The repayment of the money borrowed is not dependent on the arrival of the ship at her destined port: it is payable in any event. [WILLIAMS, J.—Where bottomry interest is reserved, the master makes himself and his owner liable contingently on the arrival of the ship. But, suppose legal interest only is stipulated for, is it any objection to the bond that the master makes himself personally liable at all events?] The Court of Admiralty will not seize the ship under such circumstances. [JERVIS, C. J.—Two of the cases cited,—the cases of The Tartar, 1 Hagg. Adm. Rep. 1, and The Atlas, 2 Hagg. Adm. Rep. 48, show that it will.] It is submitted that that is hardly the true effect of those cases. [WILLIAMS, J.—The clause as to personal liability is not material in the Admiralty Court.] According to this instrument, the vessel is seizable wherever she may happen to be: the repayment of the advances is not made contingent on her arrival at her port of destination. Lord STOWELL, in the case of The Atlas, expresses a very strong opinion upon the subject. [CRESSWELL, J.—It is difficult to get over the cases of the Tartar and the Nelson, 1 Hagg. Adm. Rep. 169, if this is hypothecation: if it is *not* hypothecation, you do not want the argument. JERVIS, C. J.—The money was advanced upon the express
 *77] condition that the ship should *be a security.] In those cases, the right to recover the advances was expressly made to depend upon the arrival of the ship at the port of discharge. In the case of The Augusta, 1 Dodson, Adm. Rep. 283, it was held that a bond of hypothecation is valid where no other security is held out than the ship and freight: *secus*, where the lender looks only to the personal security of the borrower. [JERVIS, C. J.—Would this be a good hypo-

thecation, if the right to seize the vessel were made to depend upon her arrival, notwithstanding the reservation of the master's personal liability?] The cases in the Admiralty Court seem to show that the latter collateral stipulation might be rejected: but, in ordinary cases of bottomry, the owner's liability does not arise, except upon the arrival of the ship. In the case of *The Atlas*, the money was not in hazard at all. Dr. LUSHINGTON, in the case of *The Emancipation*, 1 W. Rob. Adm. Cas. 124, infers the intention of the parties to be that which is expressly done here, and holds the instrument invalid. In the case of *The Gratitude*, 3 Ch. Rob. Adm. Rep. 240, Sir WILLIAM SCOTT goes through all the duties of a master, and he makes no mention of a power to pledge the ship in this manner. [WILLIAMS, J.—How do you deal with the passage in *Abbott*?] It is not good law. [JERVIS, C. J.—Is the case of *The Tartar* made to depend upon the ship's arrival?] It is. [JERVIS, C. J.—If this is neither hypothecation nor mortgage, but a mere license to the lenders to seize the ship, it seems to me not to give an insurable interest.] To constitute an insurable interest, there must be something more tangible than a mere personal liability. [CRESSWELL, J.—Suppose money advanced at a foreign port, for which the master draws bills upon his owner, and at the same time gives a hypothecation bond,—*Simonds v. Hodgson*, 3 B. & Ad. 50 (E. C. L. R. vol. 23),—and the ship is lost; *what answer would there be to an action upon the bills?] It would be no true hypo- [*78 thecation, unless the repayment of the money advanced was made to depend upon the contingency of the ship's arrival at her port of destination. In *Murphy v. Bell*, 4 Bing. 567 (E. C. L. R. vol. 13, 15), 1 M. & P. 493, a policy of insurance stipulated "that the goods insured were and should be valued at five tierces coffee, valued at 27*l.* per tierce, say 135*l.*; that policy to be deemed sufficient proof of interest:" and it was held that the policy was void, under the 19 G. 2, c. 37. [JERVIS, C. J.—Have you any case recognising that?] *Cousins v. Nantes*, 3 Taunt. 513, is to the same effect. BULLER, J., says, in *Kempt v. Vigne*, 1 T. R. 304, "The circumstances of this case are, that the plaintiffs were owners of the *cargo*, but were not interested in the *ship*. They laid out the money which is the subject of the insurance, in reclaiming both, after a capture and condemnation; and, although they were in no degree interested in the *ship*, yet the event which they insured, is, the safe arrival of the ship at Marseilles. These parties, therefore, who were interested in the cargo alone, did not insure that, but something else, with which they had no concern. The goods might all have arrived safe, and the ship have been lost: and yet they would have been entitled to recover on this policy, as for a total loss. And, on the other hand, if the ship had arrived, and the goods had been lost, they could not have recovered, even though they would have really

sustained a damage. The policy is not adapted to the real state of the case."

2. At all events, the interest, whatever it may be, is not well described in this policy. A hope or expectation of benefit is not a subject of insurance. The interest, be it what it may, must be correctly described: see Lord ELLENBOROUGH's judgment in *Routh v. Thompson*, 11 East, 428. *Respondentia and bottomree interest *79] must be expressly mentioned and specified in the policy:" *Glover v. Black*, 3 Burr. 1394, *Gregory v. Christie*, 3 Dougl. 419, is to the same effect. This is not a mere technical objection: it affects the risk. There is no average or salvage on a bottomry insurance; and no loss, if the ship arrives *in specie*: *Thompson v. The Royal Exchange Assurance Company*, 1 M. & Selw. 30. A sale of the ship, under justifiable circumstances, is no doubt a total loss, in the case of an insurance on ship. In *Joyce v. Williamson*, 3 Dougl. 164, 2 Park Ins., 8th edit., p. 897,—which was an action on a bottomry bond, containing a clause, that, if the ship should be taken by the enemy, &c., the bond should be void,—the ship was captured, and recaptured, and afterwards arrived at her destination, and earned freight; and it was held, that the obligee was entitled to recover upon the bond.

3. The first notice of abandonment was given before the loss was ascertained. [JERVIS, C. J.—It was justified by the result.] The second was, upon the evidence, clearly out of time. In Arnould on Insurance(a) it is said,—“Immediately the assured has determined to abandon, he must give notice of abandonment to his underwriters: of this there is no doubt: the great practical difficulty has been, to lay down any rule as to the time which the assured shall be allowed, after receiving intelligence of the loss, for making up his mind whether he will abandon or not. The cases cited in the present section in fact show that there is no fixed rule in this country on this subject, but that what shall be considered reasonable time for this purpose, must depend, in some degree, upon *the certainty of the news of the disaster*, and upon *the nature of the casualty itself*. If the intelligence is *certain*, and the disaster one,—such as capture, *arrest, or detention,—which is *80] manifestly *prima facie* a constructive total loss as long as it continues, though the time it may continue is uncertain, the assured ought to give notice of abandonment *immediately* upon receipt of the intelligence.” [JERVIS, C. J.—This is not an abandonment of *the ship*.] That creates the difficulty. *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court:—

Upon the argument of this rule, four points were made for the defendant. It was insisted,—first, that the plaintiffs had no insurable interest,—secondly, that their interest, if any, was misdescribed in the policy,—thirdly, that, having regard to the nature of their supposed

interest, there was no loss within the meaning of the policy,—fourthly, that, under the circumstances, a notice of abandonment was necessary, and was not given in due time.

Upon consideration, we are of opinion that the first objection must prevail,—that the plaintiffs had no insurable interest,—and that therefore the rule for a nonsuit must be made absolute. This view of the case renders it unnecessary to consider the other points.

The facts to explain the first point, may be shortly stated. On the 20th of September, 1846, the Hartland sailed from Quebec for Bristol. Having sustained damage, she put back to Quebec a few days afterwards, and the master there borrowed of Allan Gilmour & Co., the plaintiffs' principals, for necessary repairs and disbursements, the sum of 1675*l.* 11*s.* 6*d.*; to secure which he drew upon the owner of the ship for 1307*l.* 12*s.* 1*d.*, and upon the consignees of the cargo for 367*l.* 19*s.* 5*d.*; giving to Allan Gilmour & Co. at the same time an instrument under his hand and seal, upon the construction and effect of which the first point mainly depends.

*This instrument, after reciting the damage sustained by the Hartland,—the necessity for the advances,—the advances made [*81 by Allan Gilmour & Co. upon condition of their being secured by an hypothecation of the ship, cargo, and freight,—the delivery to Allan Gilmour & Co. of two bills of exchange by the master upon the owners of the ship, and consignees of the cargo,—proceeds thus:—"Now know ye, that, for the effectually securing to the said Allan Gilmour & Co. the due and punctual acceptance and payment of the said bills of exchange so drawn by me, the said George Hooper, one of which on the said William Hooper for the said sum of 1307*l.* 12*s.* 1*d.*, and the other on the said R. Mead & Son, for the said sum of 367*l.* 19*s.* 5*d.*, for the causes and in the manner aforesaid, I the said George Hooper have pledged, mortgaged, and hypothecated, and by these presents do, as master of the said barque or vessel called the Hartland, and in the said capacity as master, by virtue of all other powers and authorities whatsoever me thereunto in anywise enabling, pledge, mortgage, charge, and hypothecate the said barque or vessel, the Hartland, her tackle, apparel, and furniture, and the freight of the said vessel, and every part thereof, to the said Allan Gilmour & Co., their executors, administrators, and assigns, but including, with respect to the said bill on the said William Hooper, the cargo on board, the said expenses being incurred for the benefit of the ship, freight, and cargo: And I, the said George Hooper, as such master as aforesaid, do hereby grant, testify, and declare, that, in case the said bills of exchange shall be refused acceptance or payment, or be otherwise dishonoured, or not duly and punctually accepted and paid by the said William Hooper and the said R. Mead & Son, on presentment for the said purposes, according to the tenor and effect thereof, *it shall and may be lawful to and for the said*

*82] *Allan Gilmour & Co. forthwith to *seize and take possession of the said barque, the Hartland, and to cause the same to be sold and disposed of either by virtue of process to be issued out of Her Majesty's high court of Admiralty of England, or any court of Vice-Admiralty possessing jurisdiction at the port at which the said barque or vessel may at any time thereafter happen to be lying, or to be, according to the maritime law and custom of England: And I, the said George Hooper, as such master as aforesaid, do by these presents testify and declare and make known that I took up and borrowed of the said Allan Gilmour & Co. the said sums of money on the credit and account of the owner of the said barque, the Hartland, and do hereby, as far as in me lies, as master as aforesaid, grant and declare that it shall and may be lawful to and for the said Allan Gilmour & Co. to place the same to the debit and account of the owner of the said barque: And, in case of the non-acceptance or non-payment of the said bills of exchange, the said Allan Gilmour & Co. shall and lawfully may have, use, and take, all such lawful ways and means whatsoever for the recovery of the said sum of money, or such part or parts thereof as may at any time or times hereafter remain due or unpaid, as merchants or other persons in a foreign port, or other port out of the kingdom of Great Britain, advancing money, at the instance of a master of a ship or vessel, for the repairs, outfits, and disbursements thereof, to enable such ship or vessel to proceed on her homeward-bound voyage, on the credit and account of such ship or vessel and her owner, can or lawfully may have, use, or take for the recovery thereof against such ship or her owner or master."*

With a view to identify the owner of the vessel, the instrument proceeds to set out a copy of the certificate of registry, showing that the Hartland had been previously mortgaged, and then concludes with the following *agreement:—
*83] "And it is declared and agreed by and between me, the said George Hooper, and the said Allan Gilmour & Co., that, inasmuch as the said Allan Gilmour & Co. forbear any claim by way of premium or maritime interest upon the risk of the said sums of money so advanced as aforesaid, that the voyage of the said barque shall be at the sole risk and peril of the owner of the said barque or vessel the Hartland; and that, therefore, whether the ship arrive in safety or not, or in the event of shipwreck or loss of the same by the act of God, accident, or the Queen's enemies, the said sums shall, in either or in any case, be recoverable, and be paid by the owner of the said barque to the said Allan Gilmour & Co., or to their order, as aforesaid, together with such further sum or sums of money as they may pay or lay out in causing the said barque, or her freight, to be insured, should they think proper so to do, in an amount sufficient to cover the advances by them made as aforesaid; and which insurance the said Allan Gilmour & Co., by these presents, by me, the said George

Hooper, are authorized and empowered to cause to be done and made, and to charge the same to me and the owner of the said barque: And it is further agreed and declared, that the said Allan Gilmour & Co. shall and will have all the rights, privileges, and remedies, by process of the courts of Admiralty and otherwise, which by the law are given to the holders of bottomry-bonds,—anything herein contained to the contrary thereof notwithstanding: And, lastly, it is agreed and declared that the said vessel, her tackle, apparel, furniture, and her freight and cargo, shall at all times hereafter be chargeable and liable for the payment of the said sums of money advanced to enable the said barque to proceed on her voyage, and the costs of insurance as aforesaid, unto the said Allan Gilmour & Co., their executors, *administrators, and assigns, according to the true intent and meaning of these [*84 presents.”

In substance, by this instrument, Allan Gilmour & Co. forbear all interest beyond the amount necessary to insure the ship, to cover their advances; and, the master having given them bills of exchange for the amount advanced, upon her owner and the consignees of the cargo,—making his owner personally liable, as far as he can,—takes upon himself and his owner the risk of the voyage, makes the money payable at all events, and subjects the ship to seizure wherever she may be, at any moment, should the bills be refused acceptance, or be not paid.

It was conceded during the argument, that this was not an instrument of hypothecation in the usual form; and it was not contended that the master had authority to mortgage the ship: but it was said, that an hypothecation may be good, without making the repayment of the advances depend upon the arrival of the ship; and that, if the lender does not choose to take upon himself the risk of the ship's return, and will be content not to demand maritime interest, the master may pledge both the ship and the personal credit of the owner.

The cases of *The Tartar*, 1 Hagg. Adm. Rep. 1, and *The Nelson*, 1 Hagg. Adm. Rep. 169, upon which the plaintiffs' counsel relied, do not support the latter part of this proposition, for which they were cited. Where the master professes to hypothecate the ship, and also to pledge the credit of his owners, the Court of Admiralty will reject that part of the instrument which is directed to the latter object, and proceed *in rem* against the ship. But the cases cited do not show that the Court of Admiralty will do this, where the instrument is not, in other respects, in strictness an *hypothecation; because, in each of those cases, [*85 the return of the money depended upon the completion of the voyage, and the lender took upon himself the risk of the ship's return.

The case of *Samsun v. Braggington*, 1 Vez. sen., 443, is, however, referred to; and, though the report does not explain the grounds of the decision, nor very clearly disclose the circumstances of the case, yet, as it is cited with approbation in *Abbott on Shipping*, 8th edit., p.

156, it acquires additional authority, from the known accuracy and high reputation of the learned author of that work, and is said to be an authority in point.

We have been furnished with a copy of the decree, from which the following appear to be the facts of that case:—Braggington and Pitman were part owners of the Dinsley Galley, of which Pitman was master. On her homeward voyage, she was disabled, and put into Jamaica, where Pitman applied to the plaintiff to advance the necessary funds for her repairs, “for the use and on account of himself and Braggington as co-owners;” and, as a further inducement, engaged with the plaintiff, by an additional security, for the repayment of the money to hypothecate the ship. The plaintiff repaired the ship, expended for that purpose 808*l.*, and, at his request, Pitman drew upon Braggington for the amount, and, by way of additional security, as master of the ship, according to maritime usage in like cases, by deed-poll, after taking notice of the damage and advance, did, for securing the payment of the said money, hypothecate to the plaintiff the ship, with the freight and cargo. The ship sailed from Jamaica, was captured, and sold; Braggington and Pitman received the insurance upon *86] her loss, but Braggington refused to *accept the bills, and the plaintiff was not paid the amount which he had advanced for the repairs of the ship.

Upon this statement, the plaintiff filed his bill against Braggington and Nichols, the representative of Pitman, for repayment of the money advanced by him. Braggington, by his answer, admitted the plaintiff's statement, but submitted that he was not liable to repay what Pitman might have paid for the repairs, because Pitman was indebted to him, and suggested that bottomry interest had been taken for the advance; and that therefore, according to maritime custom, the lender took the risk of the voyage upon himself. There was no proof of this suggestion: and the Master of the Rolls decreed that the money advanced by the plaintiff in refitting the ship, ought to be established against Braggington and Nichols, according to their respective interests. It is not very apparent how, upon the bill and answer so framed, the validity of the hypothecation could come directly in question. The plaintiff did not seek to establish his claim by that instrument, because it did not profess to charge the owners personally with the debt; and the defendant Braggington, failing to prove that bottomry interest had been taken, could not add to the deed, by implication, a condition that the repayment of the advances should depend upon the return of the ship. The decree seems to have proceeded upon the ground that joint owners were liable for money advanced in a foreign country for necessary repairs. Whether the master had properly pledged the ship or not, the ship was lost, and the plaintiff was proceeding upon the personal liability of the joint owners. The reporter states his Honour

took time to consider, and afterwards (as he was informed) determined that the ship was well hypothecated, and that the joint owners were liable. In Abbott on Shipping, *the decree against the joint owners is stated positively: but the learned author adds cautiously, [*87 —“It is said also that the ship was *thought* (not determined) to be well hypothecated.” He does not give the full weight of his unqualified sanction to this hypothecation. And, upon examination, we think that this case is not to be considered as an authority conclusive against the more recent decisions to which reference has been made.

The deed now in question only professes to give such an interest as can be enforced in the Admiralty Court. In certain events, Allan Gilmour & Co. may seize the vessel, and cause her to be sold, by process out of the Admiralty of England, or any other Court of Vice-Admiralty possessing jurisdiction: and, further, they are to have all the rights, &c., by process of the Courts of Admiralty, or otherwise, which by law are given to the holders of bottomry bonds. The interest which they have in the ship, is, the right of proceeding in the Admiralty Court against the ship: but, if, under similar circumstances, the Admiralty Court would not act, because it has no jurisdiction, Allan Gilmour & Co. have no insurable interest. Now, the cases show, that, under circumstances like the present, the Court of Admiralty would decline to act.

In the case of *The Atlas*, 2 Hagg. Adm. Rep. 48, Lord STOWELL refused to entertain a suit of bottomry, because the advance was payable within thirty days after the arrival of the ship, “or, in case of the loss of the ship, then within thirty days next after the account of such loss should have been received in Calcutta or London.” Upon appeal, the delegates decided that the bond was void, because there was no sea risk to justify the taking of maritime interest; and so it became unnecessary to determine the principal question: but, upon the argument of the question of *jurisdiction, HULLOCK, B., observed that the condition destroyed the whole instrument. The more recent case [*88 of *The Emancipation*, 1 W. Rob. Adm. Cas. 124, is an express authority upon the same point. There, upon the face of the bond, and according to legal inference, the payment of the money advanced did not depend upon the safe arrival of the ship; and for that reason the court pronounced against the bond.

Upon these authorities, it is clear that, if the *Hartland* had arrived in this country, the plaintiffs could not have proceeded against her in the Admiralty Court. They had, therefore, no interest in the vessel. They have lost nothing. And upon this ground the defendants are entitled to succeed.

But, without reference to authority, we are of opinion, upon principle, that the master has not authority, by an instrument of this nature, to pledge the ship. By the Roman law, and still in those nations which

have adopted the civil law, every person who had repaired or fitted out a vessel, or had lent money for those purposes, had a claim upon the value of the ship, without a formal instrument of hypothecation. But, by the law of England, no such right can be acquired, except by express agreement: and a master can only make such an agreement if he act within the scope of his authority. The raising of money upon bottomry can only be justified by necessity. If the master, in a foreign country, wants money to repair or victual his vessel, or for other necessities, he must, in the first instance, endeavour to raise it upon the credit of his owners. If he can do so, he has no authority to hypothecate the vessel: but if he cannot otherwise obtain the money, he may hypothecate the ship,—not transferring the property in the ship, but giving the creditor a privilege or claim upon it, to be carried into *89] effect by legal process, upon the termination of the voyage. As incident to this transaction, the lender may, if he think fit, insist upon maritime interest: but, whether he do so or not, the advance is made upon the credit of the ship, not upon the credit of the owner; and the owner is never personally responsible.

There is no trace in our books,—with the exception of *Samsun v. Braggington*,—of any case in which a master has been held to have authority to make a valid hypothecation of a ship, unless the payment of the money borrowed has been made to depend upon the arrival of the ship. There is, therefore, nothing to show that a master has authority to hypothecate in any other manner. Indeed, if the money be originally advanced upon the credit of the owner, and, for any cause, an hypothecation be made, even before the ship leaves the place where the advances were made, the bond will be void, and cannot be enforced: *The Augusta*, 1 Dodson, Adm. Rep. 283.

For these reasons, we are of opinion that the master had no authority to make an instrument like that in question, and that the instrument passes no interest in the ship. The money advanced for repairs was a mere debt from the owner to the lenders: and, it being admitted that a mere debt from the owner to the assured for repairs and disbursements, could not legally be made the subject of an insurance, it follows that the defendant is entitled to judgment.

Rule absolute.

To constitute a right to hypothecate the ship, there must be urgent necessity in a foreign port, and a total want of sufficient credit: *O'Hara v. Ship Mary*, Bee, 100. The master has no authority to do so at a port where one of the owners resides: *Ship Lavinia v. Barclay*, 1 Wash. C. C. Rep. 49. Nor when he has funds of the owners which he has not used for the

purpose: *Patton v. The Randolph*, Gilpin, 457. Nor if the owners have a representative or correspondent at the port, who will advance what is necessary, or if the same can be procured by other means, as by bills drawn upon the owners: *Boreal v. The Golden Rose*, Bee, 131; *Ross v. Ship Active*, 2 Wash. C. C. Rep. 226.

ANN MYERS, Widow, v. CHARLES PERIGAL and Others.(a)** [90**]

Shares in a joint-stock bank, the property of which consisted, in part, of freehold and copyhold estates, and mortgages for terms of years,—Held, *not* to be within the statute of mortmain, 9 G. 2, c. 36.

THE following case was sent by the Lord Chancellor (Lord TRURO), for the opinion of this court:—

Timothy Myers, by his will, dated the 24th of June, 1844, duly executed and attested (among other things), directed his executors to convert into money all the residue of his personal estate, except his shares in The Durham and Northumberland District Bank, at Newcastle, and to invest the proceeds in government securities, and to pay the dividends arising therefrom, and the dividends arising from his said shares in The Durham and Northumberland District Bank, unto his wife, Ann Myers, for her life; and, from and after her decease, to sell and convert into money his said bank shares, and invest the same in government securities, which, with the government securities thereinbefore directed to be purchased, he directed to stand in his name for ever, and the proceeds thereof to be from time to time received by *the following societies, viz. The Society for promoting Christian Knowledge, The Society for propagating the Gospel in Foreign Parts, the Church Missionary Society, and the Church Building Society. [***91**]

The testator died on the 4th of February, 1845, leaving his said wife, now his widow, the plaintiff in this suit, him surviving.

The testator was at the time of making his will, and of his death, entitled to 560 shares in The Durham and Northumberland District Bank, at Newcastle, in his will mentioned, which is a bank established and carried on in conformity with the provisions of the 7 G. 4, c. 46, intituled “An act for the better regulating copartnerships of certain bankers in England, and for amending so much of an act of the 39th and 40th years of the reign of his late Majesty King George the Third, intituled ‘An act for establishing an agreement with the governor and company of the Bank of England for advancing the sum of three millions towards the supply of the service of the year 1800,’ as relates to the same,” and by and under a deed of settlement dated the 1st of July, 1836, whereby

(a) The defendants were,—Charles Perigal, John Robinson, Martha Keen, John Myers of Millom, Elizabeth Myers, Margaret Myers, Martha Myers, William Lewthwaite, Timothy Lewthwaite, Ann Lowther, Thomas Johnson and Elizabeth his wife, Mary Bolton, Sarah Gaskell, William Long and Eleanor his wife, Timothy Myers, John Myers of Milnthorpe, Thompson Myers, Peter Lawson and Elizabeth his wife, John Walker and Elizabeth his wife, James Harrison and Maria his wife, Mary Ann Myers, Eleanor Myers, George Doyley, William Cotton, John Thornton, The Society for propagating the Gospel in Foreign Parts, and The Incorporated Society for promoting the Enlargement, Building, and Repairing of Churches and Chapels, and Thomas Myers, and William Myers (when they should come within the jurisdiction of the court), and James Briggs.

it is (amongst other things) provided, that they, the said several persons parties thereto, all of whom were distinguished by the title of proprietors, and the several other persons who for the time being should become and be proprietors of shares in the capital of the said company, should constitute and form an association or public joint-stock banking copartnership, to be called, and they should be called, "The Northumberland and Durham District Banking Company," to be managed and conducted under and subject to the several rules, regulations, provisions, and agreements thereafter contained, and that they the said several parties thereto should and would, from time to time, and at all times, so long as they should respectively continue and remain members thereof, promote
*92] and advance the interests and *prosperity of the same, to the utmost of their power respectively; and the said company should have continuance until the same should be dissolved under or in pursuance of the provisions in that behalf thereafter contained: That the original capital or joint-stock of the said company, for carrying on the same, should consist of the sum of 500,000*l.* sterling, and should be divided into 50,000 shares, of the amount of 10*l.* each share, but might be increased, under the power for that purpose thereafter contained, by additional shares, in such manner as thereafter expressed; and the shares which at the date of the said indenture had not been taken or subscribed for, and also those which might thereafter be created as thereafter provided, should be allotted and distributed and disposed of to such persons, in such manner, and on such terms and conditions in every respect, as the directors of the said copartnership bank for the time being should deem most conducive to the benefit and advantage of the company: That the business of the company thereby established should be exclusively confined to such as was usually carried on under the term "banking," including the issuing of notes of hand or bank-notes, lending money on cash or other accounts, or upon real, leasehold, or personal security, bills of exchange, promissory notes, or letters of credit, advancing money on the deposit of title-deeds, goods, wares, and merchandise, discounting bills of exchange or promissory notes payable at or after sight, after date, or on demand, borrowing or taking up money on receipts, bills, promissory notes, or other obligations, including also purchases, investments, dealings, or sales in or upon the government or public funds of Great Britain, navy or Exchequer bills, India bonds, bank or East India stock, shares of the stock of their own copartnership, or of the stock of the Bank of England, or annuities for one or one or more life or lives, or of any other description,
*93] *and also including all other business and transactions usual in banking establishments, and consistent with the laws then or thereafter to be in force concerning joint-stock banking companies and banking copartnerships; and the business of the company should be so conducted as not to contravene any of the provisions of the said recited act:

Provided always that the funds of the said company should not in any instance be invested in the stocks, funds, or loans of any foreign country, or in the purchase of land or other real estate, except as thereafter mentioned, articles of merchandise, mining concerns or other adventures: That no benefit of survivorship should arise or take place amongst the shareholders in the said copartnership bank; and all the property of the company, as between the shareholders thereof, and as between their respective real and personal representatives, should always be considered and deemed to be personal estate; so that each and every of the shareholders should, as between and among themselves, have a distinct and separate right to his shares in the capital or joint-stock of the company, and the same should be vested in him to and for all intents and purposes, and subject to his disposition by deed or will, or, in cases of intestacy, be transmissible to his personal representatives as part of his personal estate, and distributed accordingly, but under and subject to such provisions in the deed of settlement as should for the time being affect such shares, and also to his proportion of profits and losses as next thereafter mentioned: That each shareholder should be entitled to and interested in the profits, and be liable to the losses, of the company, in proportion to his shares in the capital funds or joint-stock thereof: That, previously to the meeting of the company to be held in the month of July, 1837, as thereafter provided, and previously to the meeting to be held in January in the next and every subsequent year during the continuance of the [*94 *company, the directors should determine upon such dividend out of the clear profits of the company as they in their judgment should think fit: That the directors should, within twenty-one days next after every meeting at which any dividend should have been announced by them, or any bonus should have been determined on, cause the same dividend and bonus respectively to be divided amongst and paid to the shareholders respectively, according and in proportion to the number of their respective shares, at such times and in such manner as the directors should think fit: That it should and might be lawful for the directors for the time being of the said company, and they were thereby authorized and empowered to provide, in Newcastle-upon-Tyne, and in such other towns and places as they might think fit, such houses, offices, or premises, as they should from time to time deem requisite or expedient, for carrying on and managing the business affairs and concerns of the company, upon such terms and stipulations, and in such manner, as they might deem advisable; and such directors might, for those purposes, with and out of the funds of the company, purchase, in fee-simple, or for any other estate, or take a lease of, at a yearly or other rent, or otherwise, any houses, buildings, or premises, or in the like manner purchase or take a lease of any land, and erect and build any houses or buildings thereon, and keep such houses or buildings in repair,

for the purposes aforesaid, and fit up, adapt, and furnish the same for the use and purposes of the company, and at the expense thereof, and the same lands, houses, and buildings, or any of them respectively, or any part thereof, should or might, from time to time, and at all times afterwards, sell again, exchange, convey, assign, demise, let, or otherwise dispose of or deal with, for the benefit of the company; and that such lands, houses, and buildings so purchased as aforesaid, should, for the *95] *purposes of the said deed, be deemed personal estate, and part of the capital of the company, and from time to time included in the valuation of capital, and should be vested in trustees for that purpose appointed on behalf of the company, upon such trusts as would effectually secure the object and intention of the said deed in relation thereto: That, as to such of the funds and capital or property of the company for the time being in the hands of the company, as should not be employed, or appear necessary to be employed, in the ordinary business thereof, the directors for the time being should, so far as they conveniently could, accumulate the same at interest, and, for that purpose, might from time to time lay out and invest the same, either in the names of the trustees for the time being of the company, or of such other persons as they the said directors might appoint, in or upon some or one of the parliamentary stocks or public funds of Great Britain, or in navy or Exchequer bills, or on India bonds, or Bank or East India stock, or on mortgage or purchase of freehold, copyhold, or leasehold lands, tenements, and hereditaments in Great Britain, or in the purchase of stock in this company, or of annuities for one or more life or lives, or of any other description, as they might think proper; and any board of directors, when they should deem it expedient, might cause any of the funds or property so by this article authorized to be laid out and invested as aforesaid, to be disposed of, called in, or otherwise converted into money, and the money arising thereby to be again laid out and invested in and upon any of the stocks or securities as aforesaid, and so from time to time as occasion might require: That the general board of directors should also appoint two or more proper persons to be trustees of the said copartnership bank, in whose names, or in the name of some or one of whom, all grants, conveyances, and *96] assurances of property in favour or for the use of the *same copartnership, and all the instruments and assurances for the security or for the indemnity thereof, and of the directors, officers, property, capital, stock, and effects thereof, should be made and taken: That all securities, investments, and purchases which in pursuance of the said indenture should be taken or made by or in the names of the said present or any future trustees, or any other person or persons in trust for or on account of the company, and all moneys and other property, estates, and effects thereby secured, or therein invested, or accruing therefrom, should be under the control and subject to the order

and disposition of the board of directors of the said copartnership bank for the time being; and every order or direction made in writing by the said board of directors touching the disposition of and dealing with the same securities, investments, and purchases respectively, should be obligatory on, and observed by, the said trustees or trustee, and should be a justification to them and him, and their and his indemnity in acting in obedience to such order or direction; and all such trustees should, when required by the said board of directors, sign, seal, and execute, and should be bound to sign, seal, and execute, at the expense of the company, such declaration of trust of the estates, securities, moneys, and effects purchased, taken, holden, or possessed by, or vested in them respectively on behalf of the company, as such board of directors, or their counsel, should from time to time devise or require: That, if, in pursuance of any of the powers contained in the said indenture, the company thereby established should be dissolved, the said board of directors should, with all convenient speed, wind up, settle, and bring to a final rest and balance the accounts and affairs of the company; and, for giving effect to such winding up and settlement, but for no other purpose, the company, and the powers of the directors, and the election of new *directors to supply the vacancies, should be held [*97 to be subsisting and continuing, anything thereinbefore contained to the contrary notwithstanding; and such of the funds and property of the company as should not then consist of money, and so much of the capital and profits of the company as should remain after answering the claims and demands thereon, should be paid to and distributed amongst the shareholders existing at the time of the dissolution, and their respective executors, administrators, or assigns, in the proportions in which they should then be respectively entitled thereto.

The property of the said bank consists, among other things, of certain freehold and copyhold hereditaments, and money due on mortgage of freehold or copyhold, or leasehold hereditaments.

The plaintiff, Ann Myers, widow of the said testator, and the defendants, Martha Keen, John Myers of Millon, Elizabeth Myers, Margaret Myers, Martha Myers, William Lewthwaite, Timothy Lewthwaite, Ann Lowther, Thomas Johnson and Elizabeth his wife, Mary Bolton, Sarah Gaskell, William Long and Eleanor his wife, James Briggs and Ann his wife (since deceased), George Frearson (since deceased) and Ann his wife, Timothy Myers, John Myers of Milnthorpe, Thompson Myers, Peter Lawson and Elizabeth his wife, John Walker and Elizabeth his wife, James Harrison and Maria his wife, Mary Ann Myers and Eleanor Myers, who, together with Thomas Myers and William Myers, out of the jurisdiction of the court, are, or represent, the next of kin of the testator living at his death,—contend that the bequest of the proceeds of the sale of the testator's shares in the said bank to the said several societies in his will mentioned, is restrained and rendered void by the

act of the 9 G. 2, c. 36, for restraining the disposition of lands, whereby the same became inalienable.

*98] The defendant William Cotton, who represents The *Society for promoting Christian Knowledge, the defendant John Thornton, who represents The Church Missionary Society, the defendant The Incorporated Society for the Propagation of the Gospel in Foreign Parts, and the defendant The Incorporated Society for promoting the Enlargement, building, and repairing of Churches and Chapels, respectively contend that the last-mentioned bequest of the proceeds of the sale of the said bank shares, is a valid bequest, not restrained by the said statute.

Each party is to be allowed to refer to the will of the testator, and to the deed of settlement of The Durham and Northumberland District Banking Company, dated the 1st of July, 1836.

The question for the opinion of the court, is, whether the said bequest made by the said will of the said testator, Timothy Myers, of his, the said testator's, shares in The Durham and Northumberland District Bank, from and after the decease of his wife Ann Myers, in his will named, is a legal bequest, within the statute of the 9th year of the reign of King George the Second, intituled "An act to restrain the disposition of lands, whereby the same become inalienable."

Byles, Serjt., for the next of kin.—It is submitted that this bequest is void, by reason of the statute of mortmain, 9 G. 2, c. 36. The subject-matter of the bequest, is, shares in an unincorporated joint-stock banking company,—an ordinary copartnership in all respects but two, viz. the provisions as to survivorship, and as to the liability of the shares to be dealt with as personalty. The question arises upon the 1st and 3d sections of the statute. The 1st section recites, that "gifts or alienations of lands, tenements, or hereditaments in mortmain are prohibited or restrained by Magna Charta and divers
*99] other wholesome laws, as prejudicial to and against the *common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons to uses called *charitable uses*, to take place after their deaths, to the disherison of their lawful heirs;" and for remedy thereof, enacts "that no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or encumbered, by any person or persons whatsoever,

in trust or for the benefit of any charitable uses whatsoever,—unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds), be and be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of execution and death), and be enrolled in His Majesty's High Court of Chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect *in possession* for the charitable use intended, *immediately from the making thereof*, and be without any power of revocation, reservation, trust, *condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of [*100 any person or persons claiming under him." And the 3d section smites with sentence of absolute nullity "all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or encumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or encumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time be made in any other manner or form than by this act is directed and appointed." These words are as large and comprehensive as language can make them. What was this testator dealing with? He was a member of a copartnership possessing freehold and copyhold lands, and having moneys laid out on mortgage of land. There have been many decisions upon this statute: and the balance of authority will be found greatly in favour of the next of kin. [JERVIS, C. J.—The Vice-Chancellor of England held these shares to be within the act.(a) Mere charitable use is not the test.] It is impossible to say that this bequest does not fall within the very words of the act: it is equally clear that it is within the mischief which the act was designed to remedy. [WILLIAMS, J.—The object of the statute has long been lost sight of. It was settled many years ago that money produced by the sale of land is within the act.] In *Tomlinson v. Tomlinson*, 9 Beavan, 459, canal shares, which, *by act of parliament*, *were declared to be personal estate, and transmissible as such, [*101 were held by Sir JOHN LEACH, M. R., to be within the act. In *Howse v. Chapman*, 4 Ves. 542, a specific disposition by will, in trust

(a) *Myers v. Perigal*, 16 Simons, 533.

to sell, and in the first place pay debts, legacies, and charges of probate and execution of the trust, and in the next place, that the residue of the money be appropriated to the improvement of the city of Bath, was held void by the statute 9 G. 2, c. 36, as to a navigation share,—which, being real estate, went to the heir;—and as to money on real securities, as, mortgages, turnpike-bonds, and commissioners' bonds for the improvement of the city of Bath,—which went to the next of kin. In *Baxter, app., Brown, resp.*, 7 M. & G. 198 (E. C. L. R. vol. 49), 8 Scott, N. R. 1019, *per nom. Baxter, app., Newman, resp.*, A., B., C., and D. joined in a partnership to work a fulling-mill. Money was subscribed by all the partners; with part of which freehold land was bought, which was conveyed to A. and B. in fee; with other part a mill was build on the land, and machinery for the mill was purchased. By a partnership deed, executed by A., B., C., and D., the trusts of the land, mill, &c., were declared to be (among other things) that A. and B. should stand seised and possessed of all the estates, property, goods, &c., upon trust for the benefit of themselves and their partners as part of their partnership joint-stock in trade. There was a provision in the deed that A. and B. might borrow money upon mortgage of the stock, property, estates, &c., belonging to the copartnership; and it was declared that the land, mill, &c., *should be deemed and considered as, or in the nature of, personal estate*, and not real estate, and be held in trust for the partners as part of their partnership stock in trade. It was held that each partner had an interest in the realty corresponding with the

*102] amount of shares held by him in the *partnership. TINDAL, C. J., in delivering the judgment of the court, there says: (a) “That the claimants took no *legal interest* in the real property, is placed beyond doubt. The freehold land purchased with the money contributed by the several claimants and by other shareholders, was conveyed to trustees, ‘unto and to the use of them, their heirs and assigns, absolutely;’ the trusts subject to which the trustees were seised, being declared by the copartnership deed subsequently executed by the trustees and the several members of the copartnership thereby created. It is undoubtedly true, as was urged at the bar, that the trusts declared by the copartnership deed are such as that a court of equity would deal with the real property as personalty, so far as was necessary to carry the intention of this trading copartnership into execution. In general, there can be no question but that for all purposes necessary to effectuate the intention of the parties, personal estate may be considered as real, and real as personal, by a court of equity; as in the ordinary instance of money agreed or directed to be laid out in land; and so in the instance of a real estate under an absolute trust or direction to sell: and against this rule our decision in the present case will not in any manner militate. But, notwithstanding this acknowledged doctrine of

(a) 7 M. & G. 213 (E. C. L. R. vol. 49), 8 Scott, N. R. 1033

the court of equity, no one can deny that the land still remains land, and nothing else; and there is no authority or decision, that, for the collateral purpose of giving a vote, which has no bearing upon or reference whatever to the objects of the deed of copartnership, the right of the *cestui que trust* should not remain just as it would have been without such declaration of trusts. For, as to the declaration by the copartners in the deed, 'that the lands and buildings shall be deemed and considered as or in the nature *of personal estate, and not real estate,' we think the generality of these words must necessarily be limited by the subject-matter of the trusts declared by the deed, and that they can extend no further than the object and purposes of the deed require." [WILLIAMS, J.—It has long been settled that terms for years are within the statute: therefore, real or personal is not the test.] In *Custance v. Beardshaw*, 4 Hare, 315, it was held by Sir J. WIGRAM, that the shares of a deceased partner in the freehold and copyhold estates of the partnership, is not personal estate, for the purpose of being included in the value or amount in respect of which probate duty is payable. What is the interest which a shareholder in a copartnership, whether incorporated by charter or by act of parliament, has to convey when he parts with his shares? An interest in land, if the corporation is possessed of lands, is conveyed by every transfer of shares. Upon the dissolution of the corporation, the shareholders may become tenants in common. [JERVIS, C. J.—It has been decided,—in *Walker v. Richardson*, 2 M. & W. 882,†—that, where lands are already in mortmain (being vested in an ecclesiastical corporation), a lease of such lands to charitable uses is not within the statute 9 G. 2, c. 36.] That aids the argument. The other side will rely upon *Thompson v. Thompson*, 1 Collyer, C. C. 381, where it was held that the shares in The London Gas-Light and Coke Company,—a company incorporated by act of parliament,—are not within the statute of mortmain. Vice-Chancellor KNIGHT BRUCE there says,—“The question is, whether, upon a just interpretation of the whole of the act of G. 2, without regarding the title, which I do not regard for this purpose,—whether, upon a just and rational collection, from the language of the *body of the act, of its intention, it is a sound construction of this statute to say that the expressions ‘lands, tenements, or hereditaments,’ or ‘charge or encumbrance affecting lands, tenements, or hereditaments,’ or ‘estate or interest therein,’ as used in it, are words properly applicable to a subject of this description. I am of opinion that they are not; and, without saying (nor is it necessary to say, and I hardly understand what the expression means) whether this property is pure personal estate or not, I am of opinion, without any doubt, that it is property not falling within the range of any of the expressions contained in the statute 9 G. 2, c. 36, according to a just interpretation of the language of that act.” That is exactly what is

now contended for. The policy-holders in *March v. The Attorney-General*, 5 Beavan, 433, were not members of the corporation. *Hilton v. Giraud*, 1 De Gex & Smale, 183, was the case of shares in the London and the West India dock companies, which were properly held not to be within the statute. *Sparling v. Parker*, 9 Beavan, 450, and *Ashton v. Lord Langdale*, 20 Law Journ., N. S., Chan. 234, are, in reality, the only cases which are adverse to this argument: but the decision in the latter case proceeded entirely upon the authority of the former. *Walker v. Milne*, 11 Beavan, 507, and that class of cases, are well explained by TINDAL, C. J., in *Baxter, app., Newman, resp.*, 8 Scott, N. R. 1035, 7 M. & G. 216. Speaking of *Bligh v. Brent*, 2 Y. & C. 268, his lordship says: "We think it sufficient to advert to a broad ground of distinction between that case and the present. In the case referred to, the company, that of the Chelsea Water Works, was a corporation created by act of parliament, and charter from the crown, of which the individual shareholders were corporators. The whole *of the
*105] real property was vested in a corporation aggregate, who had the sole management and control thereof, having power to convert it into personalty, or back again into realty, at their free pleasure; the individual corporators having, as individuals, no more interest in the freehold than perfect strangers, and no interest in the surplus profits of the concern, until they actually arose." That is an express and clear distinction between shares in a corporation and shares in an unincorporated company.

Cowling, contra.—The bequest is valid. These bank shares are not an "estate or interest in land," or a "charge or encumbrance affecting lands," &c., within the meaning of the statute. The object of the statute was, to place certain restraints upon the alienation of land. The prohibition is absolute as to lands, and as to moneys to be laid out in the purchase of land. A "share" is nothing more than a subscription by an individual to a common fund, over which common fund the shareholder has no control as an individual: all the right he has depends upon contract. By the terms of the trust deed of this banking company, the legal estate in the lands belonging to the company, or which is held by them as mortgagees, is in the trustees: the whole management of the concern is exclusively confided to the directors, subject only to the control of a general meeting of the shareholders. A judgment against an individual shareholder would not affect any property of the company: all that could be taken under it would be the shares. In *March v. The Attorney-General*, 5 Beavan, 433, 441, Lord LANGDALE, M. R., says: "The grantees of the policies contract for a sum of money to be paid on a future event. Whatever may be the property
106] possessed by the grantors, *the grantees have not, by their contract, any immediate control over it or lien upon it." That will equally apply to these shares. In the case of an ordinary partnership,

each is agent for the others. It is not so in the case of joint-stock companies: *Bramah v. Roberts*, 3 N. C. 963, 5 Scott, 172. The case of *Baxter, app., Newman, resp.*, 8 Scott, N. R. 1019, 7 M. & G. 198, was a case of partnership: each member had a control over the trustee. In the case of *Bligh v. Brent*, it was distinctly decided that real property held for the purposes of a trading company, is, in equity, to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable. That case was recognised and treated as clear law, in *Humble v. Mitchell*, 11 Ad. & E. 205, 3 P. & D. 141: and no distinction is made between corporated and unincorporated companies. In *The Attorney-General v. Giles*, 5 Law Journ., N. S., Chan. 44, East India stock was held not to be within the statute. The Master of the Rolls (Lord LANGDALE) in the course of his judgment mentions *Howse v. Chapman*, 4 Ves. 542, but he evidently does not consider it as a binding authority. *Tomlinson v. Tomlinson*, 9 Beavan, 459, was not cited in *Sparling v. Parker*, 9 Beavan, 450, which, it is admitted, is strongly in the defendant's favour. But it was cited in *Walker v. Milne*, 11 Beavan, 507, and in *Ashton v. Lord Langdale*, 20 Law Journ., N. S., Chan. 234. Lord LANGDALE says, in *Sparling v. Parker*: "A shareholder in one of these companies, (a) *whether incorporated or not*, has a right to receive the dividends payable on his share,—i. e. a right to his just proportion of the profits arising from the employment of the *joint-stock, consisting partly of land; and he has also a right to assign his share for value; but, whilst he continues [*107 to hold his shares, he has no interest or separate right to the land, or any part of it. He is, indeed, interested in the employment of the land, but he cannot proceed against the land directly for anything which is due to him, or make any part of the land his own, for the purpose of satisfying any demand which he may have as shareholder. He is not in the situation of a mortgagee who has a direct interest in the land, which he may make absolutely his own by foreclosure; or of a tenant in common, or joint-tenant, who may make a part of it his own in severalty; and if, upon a dissolution or determination of the joint concern, he can become an owner of any part of the land, it is only upon a new transaction, and by acquiring a new title, as purchaser. The courts have held, that, if a man directs land to be sold, and the produce applied, either by itself or as part of a mixed fund, in payment of legacies to charities, the legacies, so far as their payment is made to depend on the produce of the real estate, must fail, as being contrary to the intent and policy of the mortmain act; and marshalling is not allowed. But no case has determined that such shares as those now in question are within the meaning of the act; and, on the whole, I am of opinion that a shareholder in such joint-stock companies as those which are now under my consideration, is not, in that character

(a) Gas-light and dock companies.

or right, entitled to any such estate or interest in land as falls within the true intent and meaning and the operation of the mortmain act of George 2." The same learned judge follows the same course in the subsequent case of *Walker v. Milne*. "It is true," he there says,^(a) "that my opinion^(b) was expressed without any knowledge or recollection of the decision in *Tomlinson v. Tomlinson*. *If I had been
*108] aware of it at that time, I do not think that it would have led to any different result." *Hilton v. Giraud*, 1 De G. & S. 183, was decided upon the authority of *Sparling v. Parker*. It was the case of an incorporated company; and, if that makes any difference, it will be less in the defendant's favour than it otherwise would have been. *Ashton v. Lord Langdale*, 20 Law Journ., N. S., Chan. 234, is a very strong case. All the authorities upon the subject are there referred to: and it was held that shares in an unincorporated banking company, which was authorized to hold lands by way of mortgage, and might have had interests in lands, and which had been constituted by deed of settlement, under which the shares were declared to be personal estate, —were not within the statute of mortmain. Vice-Chancellor KNIGHT BRUCE there says: "I do not understand that any case has been decided since *Sparling v. Parker*, at variance with it, or that any case has been decided since *Walker v. Milne*, at variance with it. A great deference is certainly due to those cases, but they are not necessarily binding on the court. If, then, I should have a strong and undoubting opinion that they are erroneous, I ought to decide otherwise than in conformity with them. But I have not such an opinion. On the contrary, if the case had now come before me for the first time, clear of all decisions, I should decide respecting the canal and railway shares as Lord LANGDALE has done. Then, as to the shares in the banking company.^(c) It is contended that they are within the act, because land may be acquired for the offices for carrying on the business of the company, or for
*109] investment, or in *respect of bad debts. This kind of property, however, is not the object of the formation of the company which is merely a trading society. I think that it is a reasonable construction that such shares should not be held obnoxious to it, merely from the fortuitous possession of real estate." And, after referring to the 1st and 3d sections of the act, the learned judge concludes: "I think that it would not be a reasonable interpretation of this act to say that these shares are an estate or interest in land, under the words which I have mentioned. I regard the case which has been cited^(d) with great respect: but I cannot agree with such an extended construction." In *Curling v. Flight*, 2 Phillips, 617, Lord COTTENHAM says:

(a) 11 Beavan, 518.

(b) In *Sparling v. Parker*.

(c) The Manchester and Liverpool District Banking Company, constituted by a deed of settlement, under which the shares were declared to be personal estate, and under which the directors were authorized to invest money on the mortgage of real estate.

(d) *Myers v. Perigal*, before Sir L. SHADWELL, V. C., 16 Simons, 533.

"The cases have sufficiently established that a purchase of shares in such concerns (a) is something very different from a purchase of the land, or of a share in the land, in which they are carried on." If this were *res integra*, and the object only of the act were to be looked at, the shares in question clearly could not be held to be within it. (b)

Byles, Serjt., in reply.—The court will not marshal assets for the purpose of giving effect to charitable bequests: *The Philanthropic Society v. Kemp*, 4 Beavan, 581. There, a testatrix bequeathed legacies to charities and to individuals, and she directed her charity legacies to be paid "out of her ready money, and the proceeds of the sale of her funded property, personal chattels, and effects, and not from the proceeds of her leasehold or real estates;" and she charged her leasehold estates, in addition, with the payment of her debts, funeral and testamentary expenses, and legacies not given to charities. The pure personalty was insufficient to pay the debts, &c., and all the legacies. *It was held, that the charity legacies failed in the proportion of the mixed personalty to the pure personalty. The [*110 like was held in *Sturge v. Dimsdale*, 6 Beavan, 462. An interest in an easement is within the statute: *Negus v. Coulter*, 1 Ambler, 367. That was the case of a grant by the crown of the right to lay chains in part of the Thames, to moor ships; and it was held to be an interest in land, and within the statute. That these shares may be taken under an extent, or charged in execution at the suit of a creditor, is clear: 1 & 2 Vict. c. 110, s. 14. (c)

The following certificate was afterwards sent to the Lord Chancellor:—

"This case has been argued before us by counsel: we have considered it, and are of opinion that the said bequest made by the said will of the said testator Timothy Myers, of his, the said testator's, shares in the Durham and Northumberland District Bank, from and after the decease of his wife, Ann Myers, in his will named, is a legal bequest within the statute of the ninth year of the reign of King George the Second, intituled 'An act to restrain the disposition of lands, whereby the same become inalienable.' "JOHN JERVIS.

"C. CRESSWELL.

"E. V. WILLIAMS.

"T. N. TALFOURD." (d)

(a) A mining company:

(b) See *Buckeridge v. Ingram*, 2 Ves. jun. 652.

(c) And see 3 & 4 Vict. c. 82, s. 1.

(d) Lord ST. LEONARDS, C., on the 1st of December, 1852, decided in conformity with the opinion of this court, reversing the decree of the Vice-Chancellor of England, Sir L. SHADWELL. See 16 Simons, 533.

Shares in bank and other corporations, with a capital apportioned in shares assignable for public accommodation, but holding real estate, are nevertheless personal property, and this is the general doctrine of American law: 3 Kent Com. 340, note; See *Price v. Price*, 6 Dana, 107. It saves confusion to consider a share of stock in a corporation of any kind as a transmissible and assignable franchise of the personal kind, giving the proprietor a right to his proportion of the profits in money, in the shape of annual dividends, and to a return of his capital in money upon dissolution or expiration of the charter: *James v. Woodruff*, 2 Denio, 574.

***111] *HELSHAM v. BLACKWOOD and Another. June 13.**

A declaration for a libel imputing to an officer in the army, that he had been guilty of murder, in killing his opponent in a duel; and further alleging that the duel was supposed to have been fought under circumstances revolting to the ordinary notions of honour,—is not answered by a plea alleging merely that the plaintiff killed his antagonist, and was tried for murder, and acquitted: the defendant was bound to justify also the matter of aggravation.

Semble, that a replication setting up the acquittal of the plaintiff, by way of estoppel, would be bad.

THIS was an action on the case for a libel.

The declaration stated that the plaintiff, before and at the time of the committing by the defendants of the several grievances therein-after mentioned, was a person of good name, credit, and reputation, and deservedly enjoyed the esteem and good opinion of divers persons: That, before and at the time of the committing by the defendants of the grievances thereafter mentioned, the plaintiff was a captain in one of Her Majesty's regiments of militia: Yet that the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, theretofore, to wit, on the 1st of December, 1850, falsely and maliciously did publish, and cause and procure to be published, of and concerning the plaintiff, in a certain magazine called "Blackwood's Edinburgh Magazine," a certain false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, containing the false, scandalous, malicious, defamatory, and libellous matters following, of and concerning the plaintiff, that is to say:—"We ourselves were present at a remarkable trial for duelling about eighteen or twenty years ago, at the Old Bailey, before the late excellent and very learned Baron BAYLEY; on which occasion he also laid down the rule of law respecting duelling with uncompromising firmness and straightforwardness. This was the case of Captain Helsham (meaning the plaintiff), who had shot Lieutenant Crowther in a duel at Boulogne (meaning Boulogne, in the republic of France). There were rumours of foul play
 *112] having been practised; and a *clergyman, a brother of the deceased, made strenuous and persevering efforts to bring Captain Helsham (meaning the plaintiff) to trial. The latter (meaning the plaintiff) continued for some time after the duel in France, though anxious to return to England: and, after (as we have heard) taking the opinion of a well-known counsel at the criminal bar, who advised him (meaning the plaintiff) that he (meaning the plaintiff) could not be tried in this country for a duel fought in a foreign country not under the British crown, he (meaning the plaintiff) came to England, where he (meaning the plaintiff) was instantly arrested under the statute 9 G. 4, c. 31, s. 37, which had been passed two or three years previously, viz., in 1828, and must have altogether escaped the notice of the counsel in question. That act authorizes the trial in England of

any British subject charged with having committed any murder or manslaughter abroad, whether within or without the British dominions, as if such crime had been committed in England. Captain Helsham (meaning the plaintiff) was admitted to bail to meet the charge; and having duly surrendered, took his (meaning the plaintiff's) place at the Old Bailey at 9 o'clock on Saturday morning. He (meaning the plaintiff) was a middle-aged man of gentlemanly appearance; his (meaning the plaintiff's) features indicating great determination of character; but they wore an expression of manifest anxiety and apprehension, as he (meaning the plaintiff) entered the dock, and, looking down, beheld immediately beneath him (meaning the plaintiff) the brother of the man whom he (meaning the plaintiff) had shot, and through whose ceaseless activity he (meaning the plaintiff) was then placed on trial for his life as a murderer: and he (meaning the plaintiff) was to be tried by an uncompromising judge (meaning the said Baron BAYLEY), stern and exact in administering the law, and animated *by pure religious spirit, but withal thoroughly humane. Through- [*113
out the whole of that agitating day, the prisoner (meaning the plaintiff) stood as firm as a rock: sometimes his (meaning the plaintiff's) arms folded; at others, his (meaning the plaintiff's) hands resting on the Bar; while his eyes were fixed intently on the judge, the witnesses, or the counsel,—every now and then glancing with gloomy inquisitiveness at the jury and the judge. His (meaning the plaintiff's) lips were from first to last firmly compressed. *It was understood that the counsel for the prosecution were in possession of a damning piece of evidence, viz., that the prisoner (meaning the plaintiff) had spent nearly the whole of the night immediately preceding the duel in practising pistol firing.* However the *fact* might be, it nevertheless was not elicited at the trial: and probably the prisoner (meaning the plaintiff), who had been prepared for such evidence being produced, began, on finding that it was not so, to take a more favourable view of his chances. As the case stood, however, it looked black enough to those who knew the law, and the character of the judge who sat to administer it. That venerable person began his summing up to the jury about 7 o'clock in the evening: and the scene can never be effaced from our memory. The court was extremely crowded. The lights burned brightly; exhibiting anxious faces in every direction. But, what a striking figure was the central one,—that of the prisoner! (meaning the plaintiff.) Immediately over his (meaning the plaintiff's) head was a mirror, so placed as to reflect his face and figure vividly, especially to the jury. A few moments after the judge had commenced his charge, we observed the ordinary of Newgate glide into court,—the late Rev. Dr. Cotton,—in full canonicals, and with flowing white hair, having a picturesquely venerable and ominous appearance, and take his seat near to, but a little [*114
behind, the judge. It was then usual *for the ordinary to be pre-

sent at the close of capital cases, in order to add a solemn "Amen" to the prayer with which the sentence of Death concluded,—that "God would have mercy on the soul" of the condemned. "Gentlemen of the jury," commenced Mr. Baron BAYLEY, amidst profound silence, "We have heard several times, in the course of this trial, of *the law of honour*: but I will now tell you what is *the law of the land*,—which is all that you and I have to do with. It is this, that, if two persons go out with deadly weapons, intending to use them against each other, and do use them, and death ensue, that is murder,—*wilful murder*." He paused for a moment, as if to give the jury time to appreciate the dread significance of his opening. As soon as he had uttered the last two words, Captain Helsham's (meaning the plaintiff's) cheek was instantaneously blanched. We were eyeing him (meaning the plaintiff) intently at the moment, and shall never forget it. He (meaning the plaintiff) stood, however, with rigid erectness, gazing with mingled anger and fear at the judge, whom he (meaning the plaintiff) felt to be uttering his death-warrant, and, after a while, bent his eyes on the jury, from whom they wandered scarce a moment during that momentous summing up,—one which with every word was letting fall around him (meaning the plaintiff), as he must have felt, the curtain of death. "The law of honour," said the judge, towards the close of his charge, "is an imposture, a wicked imposture, when set against the law of the land, and the law of God Almighty,—claiming the right to take away human life. I tell you, who sit there to discharge a sworn duty, that a fatal duel is malicious homicide; and *that is wilful murder*." The jury retired to consider their verdict; and the judge at the same time quitted the court, till his presence should be required again. Captain Helsham (meaning the plaintiff), however, continued standing at the Bar, almost *115] motionless as a statue. After a prolonged absence, of an hour and forty minutes, the jury returned into court. The prisoner (meaning the plaintiff) eyed them, as one by one they re-entered their box, with a solicitude dismal to behold: and the irrepressible quivering of his upper lip indicated mortal agitation. The verdict, however, was, "Not guilty;" on which the prisoner (meaning the plaintiff) heaved a heavy sigh, passed his hand slowly over his damp forehead, bowed slightly but rather sternly to the jury, and was then removed from the Bar, and released from custody. When the verdict was, a few minutes afterwards, communicated to Baron BAYLEY, who had remained in attendance in an adjoining room, he remarked, gravely, "I did *my* duty. It is well for Captain Helsham (meaning the plaintiff) that the verdict is as it is. Had it been the other way, I should certainly have left him (meaning the plaintiff) for execution." In that case the duellist (meaning the plaintiff) would have died on the gallows on the ensuing Monday morning. By means of the committing of which said grievances by the defendants, the plaintiff had been and was greatly

injured in his said good name, credit, and reputation, and brought into public scandal and disgrace, and had been and was shunned and avoided by divers persons, and otherwise injured. To the plaintiff's damage of 5000*l.*, &c.

Plea, that, before the committing by the defendants of the supposed grievances in the declaration mentioned, or any part thereof, and after the passing and coming into operation of a certain statute made and passed in a session of parliament holden in the ninth year of the reign of His late Majesty George the Fourth,^(a) heretofore king of the United Kingdom of Great Britain and Ireland, intituled "An act for consolidating and amending the statutes in England relative to offences against the *person," to wit, on the 1st of April, 1829, to wit, on land out of the said united kingdom, to wit, at Boulogne [*116 aforesaid, in the then kingdom of France, the plaintiff, then being a subject of his said then Majesty, did feloniously, wilfully, and of his malice aforethought, shoot off and discharge at and against one Joseph Crowther, then being a subject of his said then Majesty, and then being a lieutenant, that is to say, the said Lieutenant Crowther, in the declaration mentioned, a certain pistol then loaded with gunpowder and lead, to wit, in a certain duel then and there fought by and between the last-mentioned person and the plaintiff: and the plaintiff did then and there, by means of his, the plaintiff's, so as aforesaid feloniously, wilfully, and of his malice aforethought, shooting off and discharging such pistol as aforesaid, so loaded as aforesaid, at and against the said Joseph Crowther as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, give unto the said Joseph Crowther one mortal wound, of which said mortal wound the said Joseph Crowther did then and there die; and in manner, and by the means aforesaid, the plaintiff did then and there the said Joseph Crowther feloniously, wilfully, and of his malice aforethought, kill and murder, to wit, in the said duel: That afterwards, to wit, at a certain session of oyer and terminer of his late Majesty King William the Fourth, late King of the united kingdom of Great Britain and Ireland, duly holden at Justice Hall, in the Old Bailey, within the parish of St. Sepulchre. in London, to wit, on the 7th of October, in the first year of the reign of his said late Majesty King William the Fourth, before John Crowder, Esq., then mayor of the city of London, Sir JOHN BAYLEY, knight, then one of the justices of his said late Majesty King William the Fourth, assigned to hold pleas before the same King himself, that is to say, being the said judge in the declaration mentioned, and therein described as Mr. Baron *BAYLEY, Sir JOHN BERNARD BOSANQUET, knight, one of the [*117 justices of the said late King William the Fourth of his Court of Common Pleas, and others their fellows, justices of the said late King William the Fourth, for that purpose, and according to the statute in

(a) 9 G. 4, c. 31, s. 7.

that behalf, assigned by letters-patent of the said King William the Fourth made under the Great Seal of the united kingdom of Great Britain and Ireland,—it was duly presented, according to the form of the statute in that case made and provided, by the oaths of divers, to wit, thirteen good and lawful men of the city aforesaid, duly qualified according to law, then and there sworn and charged to inquire for our said then lord the King of and concerning the said murder, That the now plaintiff, being a subject of our late sovereign lord George the Fourth, &c. &c. (setting out the indictment): That the then sheriffs of the said city of London, whose names were to the defendants unknown, were thereupon commanded by the said justices in and at the said session, that they did not omit, by reason of any liberty in their bailiwick, but that they should take the now plaintiff, if he should be found in their bailiwick, to answer our said then lord the King, to wit, his said late Majesty King William the Fourth, concerning the premises in the said indictment mentioned; and thereupon, at the same session of oyer and terminer of our said then lord the King, to wit, on the 9th of October, 1830, before the said justices above named, and others their fellows, justices aforesaid, came the now plaintiff in his own proper person, and pursuant to a certain recognisance by him and his sureties in that behalf before then entered into, he, the plaintiff, having been duly arrested by his body by the said sheriffs, under the aforesaid statute, and by virtue of the premises in that behalf, before the entering into the said recognisance, and then and there surrendered himself to answer the

*118] premises aforesaid, and was then brought to the bar *there, that is to say, in Justice Hall aforesaid, in his proper person, and was then and there committed to the custody of certain persons then being, and as, sheriffs of the said city of London: That such proceedings were thereupon afterwards duly had and taken upon the said indictment, that afterwards, to wit, on the 9th of October, 1830, that is to say, the said Saturday in the said supposed libel mentioned, the plaintiff, in his proper person, was brought into the said Justice Hall, in the Old Bailey aforesaid, at the said session of oyer and terminer, before the said Sir JOHN BAYLEY and divers, to wit, five others of the said fellows, justices of the said late King William the Fourth, and was then duly tried upon the said indictment, whether he was guilty of the murder in the said indictment mentioned or not, by divers, to wit, twelve men of the city aforesaid, sworn to recognise on their oath whether the plaintiff was so guilty, or not: That the case of the plaintiff on the trial looked black enough to those who knew the law and the character of the judge, that is to say, the said Sir JOHN BAYLEY, who sat at Justice Hall aforesaid on the day and at the time aforesaid, to administer the law; and that the said Sir JOHN BAYLEY presided at the said trial, and summed up the case to the jury: That the said Joseph Crowther in the said indictment mentioned was and is the said Lieutenant Crowther in

the declaration mentioned: That there were and existed, before and up to and at the said trial, rumours of foul play having been practised, to wit, by the plaintiff, to wit, by reason of and in and about and touching and concerning the said duel, and the fighting thereof by the plaintiff: That the aforesaid trial of the plaintiff for the offence aforesaid, was and is the said trial in the supposed libel mentioned: And that therefore the defendants, at the said time when, &c., committed the supposed grievances in the declaration mentioned, as they lawfully might, for the cause aforesaid,—verification.

*Replication,—that the defendants ought not to be admitted or received, in their said second plea, to aver that the plaintiff [*119 did, in manner, and by the means, and at the time in the said second plea alleged, feloniously, wilfully, and of his malice aforethought, kill and murder the said Joseph Crowther, because he, the plaintiff, said, that, after he, the plaintiff, had so surrendered himself to answer the premises in the said indictment mentioned, and was brought to the bar at the Justice Hall aforesaid, in his proper person, and was committed to the custody of the said sheriffs of the said city of London, in manner and form as in the said second plea mentioned, he, the said plaintiff, having heard the said indictment then and there read, said that he was not guilty of the premises aforesaid, in the said indictment above alleged and charged against him, and concerning that for good and ill he put himself upon the country; and John Clark, clerk of the said session of oyer and terminer, who prosecuted for our said late lord the king in that behalf, did the like; therefore the sheriffs of the said city of London were commanded that they did not omit by reason of any liberty in their bailiwick, but that they should cause to come before the said justices of our said late lord the King, and others their fellows, justices aforesaid, in the said second plea mentioned, at the Justice Hall aforesaid, on Friday, the 8th of October, then instant, forty-eight good and lawful men of the city aforesaid, by whom the truth of the premises might be better known and inquired into, and who had no affinity to the now plaintiff, to recognise upon their oath whether the now plaintiff was guilty of the murder aforesaid, or not: and the same session of oyer and terminer of our said late lord the King was then, by the said justices of our said late lord the King, adjourned until Friday, the 8th day of the same month of October, in the first year of the reign of our said late lord the King, to be holden at the Justice *Hall afore- [*120 said; at which session of oyer and terminer of our said late lord the King, holden, by the said adjournment, at the Justice Hall aforesaid, on the said Friday, the 8th of October, in the year first aforesaid, before the said justices of our said late lord the King above named, and others their fellows, justices aforesaid, came as well the said John Clark, who prosecuted for our said late lord the King in that behalf, as the now plaintiff in his proper person; and the jurors of the said jury by

the said sheriffs for that purpose in due form of law impanelled and returned, to wit, &c. (naming them), being called, came; who being chosen, tried, and sworn to speak the truth of and concerning the premises in the said indictment mentioned, said, upon their oath, that the now plaintiff was *not guilty* of the premises in the said indictment above alleged and charged against him, as he, the now plaintiff, in pleading, for himself had alleged: upon which it was considered and adjudged by the court there, that the now plaintiff, of the premises aforesaid, in the indictment aforesaid, be discharged and go without day,—as by the record thereof remaining in the said court of our said late lord the King, reference being thereunto had, would more fully and at large appear: and this the plaintiff was ready to verify by the record; therefore he prayed judgment if the defendants ought to be admitted or received, against the said record, to aver, in their said second plea, that the plaintiff did, at the time, in the manner, and by the means in the said second plea alleged, feloniously, wilfully, and of his malice aforethought, kill and murder the said Joseph Crowther.

To this replication, the defendants demurred specially, assigning for causes,—that the said replication is pleaded by way of estoppel,—that the plaintiff in and by the said replication says that the defendants ought not to be admitted or received to aver that the plaintiff did *121] **feloniously, wilfully, and of his malice aforethought, kill and murder the said Joseph Crowther, for the grounds, causes, and matters therein mentioned, and has prayed judgment if the defendants ought to be admitted or received, against the said supposed record, to aver in their said second plea, that the plaintiff did, at the time, in the manner, and by the means in the said second plea alleged, feloniously, wilfully, and of his malice aforethought, kill and murder the said Joseph Crowther; whereas the said replication ought not to have been so pleaded, and ought not to allege that the defendants ought not to be admitted or received as therein stated, &c.*

The plaintiff joined in demurrer.

Peacock (with whom was *Cowling*), in support of the demurrer.(a)—1. The question is, whether the defendants are estopped by the judgment of acquittal, from showing in this action that the plaintiff was really guilty, in law, of the crime for which he was arraigned. The authorities upon the subject are abundantly clear. Thus, in Buller's *Nisi Prius*, 245, it is laid down that, "Though a *conviction* in a court of criminal

(a) The points marked for argument on the part of the defendants, were as follows:—

"That the libel in the declaration resolves itself into a charge of murder:

"That there are no degrees in murder:

"That there is no such thing known to the law as a 'fair' murder:

"That there can be no such distinction as a 'fair' or a 'foul' duel, where it ends fatally:

"That it is no good replication, to set up by way of estoppel the alleged acquittal in the criminal court, to the prosecution in which the defendants were neither parties nor privies:

"That the verdict and judgment relied on by the replication were *res inter alios actas*, and can form no ground of estoppel."

jurisdiction be conclusive evidence of the fact, if it afterwards come collaterally in controversy in a court of civil jurisdiction; yet an *acquittal* in such court is no proof of the reverse. As, *suppose the father convicted on an indictment for having two wives, this would be [*122 conclusive evidence in an ejectment, where the validity of the second marriage was in dispute: *Boyle v. Boyle*, 3 Mod. 164. But an acquittal would not prevent the party from giving evidence of the former marriage, so as to bar the issue of the second; for, an acquittal ascertains no fact, as a conviction does." The acquittal may result from the non-appearance of the prosecutor, or the absence of other necessary witnesses. Suppose a man indicted for arson, and acquitted: would an insurance-office be estopped, in an action upon a policy, from setting up as a defence that the plaintiff had wilfully set fire to his house? It would be manifestly unreasonable that they should be, seeing that they were no parties to the original proceeding, and had no opportunity of examining witnesses. Equally absurd would it be, if the acquittal of a man charged with bigamy were to be held to show conclusively that the second was the lawful wife, and so disinherit the children of the first marriage. In *Starkie on Evidence*, vol. I. p. 278, it is said: "In an action brought by a private person, the *acquittal* of the defendant upon an indictment is not evidence, because the plaintiff was no party to the criminal proceeding, and therefore his private remedy ought not to be concluded by the result. In addition to which, it may be observed, that an acquittal, however well founded, would seldom, if ever, show conclusively that the defendant had not committed an injury for which he is responsible in damages." [MAULE, J.—It has been held, that, if a man be adjudged by the sessions to be the father of a bastard child, he cannot afterwards complain in the spiritual court against one for saying that he had a bastard: "for, being sentenced to be the reputed father by the justices of the peace at the sessions, which is by authority of the *statute law, it cannot be now impeached in the spiritual court [*123 nor elsewhere; and all are concluded to say the contrary, until it be reversed:" *Webb v. Cook*, Cro. Jac. 535, 626, *Thornton v. Pickering*, 1 Freem. 283, 3 Keble, 200, and *Rex v. The Inhabitants of Rislip*, 1 Lord Raym. 394, 2 Salk. 524, 3 Salk. 261, 5 Mod. 416, Holt. 572, are to the same effect.] If a man be indicted for an assault, and acquitted, would such acquittal be an answer to an action in a civil court at the suit of the person assaulted? In *England v. Bourke*, 3 Esp. N. P. C. 80, which was an action of slander, with a plea of not guilty, the words laid in the declaration were, "You are a thief and a murderer." The plaintiff had been tried for murder, and acquitted. And Lord KENYON said—"There is no justification of the truth of the words: had there been, *notwithstanding the acquittal, I would have tried the truth of the plea.*" Again, in the subsequent case of *Cooke v. Field*, 3 Esp. N. P. C. 133, the same learned judge lays down the same doctrine.

That was an action for words charging the plaintiff with being accessory to a felony. *Bearcroft* laid it down as a principle, that, though the principal thief had previously been acquitted of the felony, it would be competent for the defendant in this cause to go into evidence to prove his guilt; because *what had passed between other parties could not affect him*: and he mentioned it as a common case, that, where the principal has been convicted, it is, nevertheless, on the trial of the accessory, competent to the defendant to prove the principal innocent. To both these propositions, Lord KENYON assented; and added, "that, where a defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial by that *124] verdict, without the intervention of a grand *jury." In *Gibson v. M'Carty*, Cas. Temp. Hardw. 311, *Strange*, for the defendant, offered to give in evidence the record of a conviction of the plaintiff for forgery. Serjt. *Parker* objected to its reception, "because it is the rule of evidence, that no record of a criminal action can be given in evidence in a civil suit, because such a conviction might have been upon the evidence of a party interested in the civil action." And Lord HARDWICKE said: "This is a pretty tender thing, and the general rule is as my brother *Parker* mentions; and has been so strictly kept to, that, in the case of the family of the Hilliards, upon a trial at bar, in a question of legitimacy, the court refused to admit a sentence of excommunication in the spiritual court, for fornication between the father and mother of the party whose legitimacy was impeached, to be given in evidence: therefore, I think you cannot give this conviction in evidence." [TALFOURD, J.—It certainly does sometimes happen that the jury, in a civil suit, do not adopt the conviction or the acquittal. It must, however, be borne in mind, that, at the time the cases cited were decided, the party was not received as a witness.] Would the acquittal of a party charged with having forged a bill, be received as evidence of the alleged forger's right to recover upon the bill? A conviction or an acquittal is conclusive evidence of *the fact* of conviction or acquittal. But an acquittal is not conclusive or any evidence of the innocence of the party, except where it is sought to punish him again for the offence: in a civil suit, it is *res inter alios*. [MAULE, J.—That is, the accused may plead *autrefois acquit*.] It is not an estoppel; but a rule of law, that a man shall not be twice put in jeopardy for the same offence. The replication in this case, therefore, is clearly bad.

*125] *2. The objection to the plea, is, that it does not amount to a justification of the alleged libel.(a) The substance of the plea

(a) The points intended to be argued on the part of the plaintiff, were as follows:

"The plaintiff will object that the second plea of the defendants is bad in substance, inasmuch as it does not answer the gist of the whole of the libellous matter set forth in the declaration:

"The plaintiff will also contend that the replication to the second plea is good, on the grounds—that, when a person has been once acquitted of an offence in due course of law, on the merits, no one can afterwards be permitted to aver in a court of justice that such person was guilty of

is, that the plaintiff was actually guilty of murder,—that he went out with intent to kill, and did kill, his adversary. [JERVIS, C. J.—The plea does not justify that part of the libel which speaks of “a damning piece of evidence,” namely, that the prisoner had spent nearly the whole of the night immediately preceding the duel, in practising pistol firing.] There are no degrees of murder. The court cannot inquire whether the duel was fought in a fair or an unfair manner. [JERVIS, C. J.—It certainly would create a very different impression upon the public mind, whether the duel was honestly conducted or not. No doubt, a man may be guilty of a libel, in imputing dishonourable conduct to another, though not involving a breach of any positive law. Suppose you impute to a man that he has been guilty of some act that is discreditable to him as a gentleman, and also something which is cognisable by the criminal law,—in order to justify yourself in an action for the libel, must not your plea cover the whole? Or, suppose a man indicted for an assault, and acquitted, and another, in publishing an account of the transaction, states that the assault was committed in a gross, *barbarous, and unmanly manner,—would the publica- [*126 tion be the less libellous, because you are able to prove an assault unaccompanied by the circumstances of aggravation?] Assault is very different from murder: it may be condoned. [MAULE, J.—The question here is, whether the whole libel is justified. Suppose the defendants had said that Captain Helsham fired at his opponent and killed him with a poisoned bullet,—would that be justified by such a plea as this?] It is not denied that there may be circumstances of aggravation which must be specially justified. But, will the court try whether or not a duel has been fought strictly according to the laws of honour? [JERVIS, C. J.—It is not, as you are assuming, the question of murder or no murder that is to be tried here; but, libel or no libel. MAULE, J.—Perhaps you will say that practising pistol firing all the previous night, was no more than adopting reasonable and proper precaution.] It is no more than saying that he was a skilful shot. That which the libel imputes to the plaintiff, is, that he wilfully and maliciously shot at and murdered the deceased. In *Hunt v. Bell*, 1 Bingh. 1 (E. C. L. R. vol. 8), 7 J. B. Moore, 212 (E. C. L. R. vol. 17), it was held that a party who pursues an illegal vocation, has no remedy by action for a libel regarding his conduct in such vocation. [MAULE, J.—There the charge was not libellous, except in relation to the plaintiff's vocation.] So, this is only libellous with reference to the particular act charged,—the fighting the duel. That which is the aggravation here, only goes to the manner of committing the murder. [MAULE, J.—You impute a great amount of malice, and you say that you need only justify the

the offence of which he was so acquitted; and that the objection that the defendants are not parties or privies to the record of the plaintiff's acquittal, is either not well founded, or has no application to a criminal case.”

minimum that suffices to constitute the killing murder.] The court cannot, it is submitted, measure the degrees of malice. [MAULE, J.—Do you deny the existence of degrees in murder?] Yes. At least, it *127] is denied that a *court of justice can sit and try whether that which is confessedly a *murder*, has been committed according to the conventional rules of honour and propriety,—whether the thing has or has not been done in a gentlemanly manner. [MAULE, J:—All murders are not of equal guilt. Many persons have been convicted of murder, and, with the general concurrence of mankind, have not been visited with capital punishment. Nobody suggests that the law of France is absurd, when it speaks of “murder with extenuating circumstances.”] The court would not try whether a prize-fight was fairly conducted or not. [MAULE, J.—Why not, in an action for a libel? TALFOURD, J.—In Captain De Roos’s case, the Court of Queen’s Bench sat for two days to inquire whether or not Captain De Roos had been guilty of cheating at an illegal game of cards; and the issue was found for the defendant. MAULE, J.—I cannot see why you should be relieved from justifying the imputation of unfair and dishonourable conduct, because it happens to be accompanied by a charge of crime.] In *Yrisarri v. Clement*, 3 Bingh. 432 (E. C. L. R. vol. 11), 11 J. B. Moore, 308 (E. C. L. R. vol. 22), it was held that an action of libel does not lie for anything written against a party touching his conduct in an illegal transaction. Murder, like treason, is so repugnant to all law, human and Divine, that the court cannot enter into the consideration of the circumstances under which it was committed: they can only properly inquire whether the charge amounts to murder or not.

D. Keene (with whom was *Quain*), *contra*.—With regard to the plea, nothing can be usefully added to what has already fallen from the court during the discussion: and, if the plea be no answer to the action, it will be unnecessary to argue in support of the replication.

*128] *JERVIS, C. J.—It is unnecessary to express any opinion as to the validity of the replication. Though we certainly entertain a strong impression on the subject, it would be hardly right to express it, not having heard what Mr. *Keene* might have to urge in support of it. The whole court, however, is of opinion that the plea, which professes to justify the entire libel, but fails to justify what we hold to be a material part of it, is a bad plea. The libel in substance charges that the plaintiff was guilty of murder under circumstances of grave and malignant aggravation; and the justification states simply that the plaintiff committed murder, by killing his antagonist in a duel. It does not lie in the mouth of the defendants to say that it matters not whether the murder was committed under one state of circumstances or another because the very terms in which the libel is conceived,—speaking of the plaintiff’s conduct anterior to the meeting, and calling it “a damning piece of evidence,” show that the defendants intended to

impute to the plaintiff something which in their estimation was very much more culpable than murder under the circumstances which usually attend a hostile meeting of the kind alluded to. I think we should be doing serious injury to public morals, if we permitted ourselves to be influenced by the argument of Mr. *Peacock*, that it makes no difference as to the quality of the libel, whether the alleged duel was fought fairly as it is called, or unfairly. It certainly could not be said, upon a trial for killing in a duel, in a criminal court, that the question of murder or no murder was to depend upon whether or not the affair had been conducted with a due regard to the laws of honour. But, to say that the court is not at liberty to take the circumstances into consideration when called upon to determine the question of libel or no libel, is quite a different matter. When the question is, murder *or no murder, [*129 in ascertaining the innocence or guilt of the party charged, the court cannot enter into an investigation of extenuating circumstances: but, in a case like this, the circumstances must necessarily form a very large portion of the inquiry. If it were otherwise, the most opprobrious and defamatory language might be uttered of a man who had had the misfortune which is said to have befallen this gentleman, and the law would give him no redress. I think such a state of things cannot possibly be permitted to exist. For these reasons, I think the plaintiff must have judgment, for the insufficiency of the plea.

MAULE, J.—I am of the same opinion. When an action is brought for a libel, to make a good plea to the whole charge, the defendant must justify everything that the libel contains which is injurious to the plaintiff. If the libel charges the commission of several crimes, or the commission of a crime in a particular manner, the plea must justify the charge as to the number of crimes (a) or the manner of committing the crime. If the crime is charged with circumstances of aggravation, as here, the plea is clearly bad if it omit to justify that. That which is charged in this case, viz. that the plaintiff had spent nearly the whole of the night immediately preceding the duel in practising pistol firing, though, if the fact were so, it would make the murder no more murder than if the fact were wanting, it clearly aggravates the libel. The defendants' own description of it as a "damning piece of evidence," shows that the libel meant something more than the plea attempts to justify. If the libel had imputed murder *simpliciter*, it would have been enough to show in the plea that the *plaintiff had com- [*130 mitted murder. But, if the libel goes further, and states something besides which is injurious to the plaintiff's character, it is clear, upon every principle of the law of libel, that that must be justified as well as the rest, or the defence fails. Nobody can doubt, that, if Captain Helsham had been guilty of the atrocity which this libel imputes to

(a) See *Clarkson v. Lawson*, 6 Bingham 266 (E. C. L. R. vol. 19), 3 M. & P. 605; 6 Bingham 537, 4 M. & P. 356; *Clarke v. Taylor*, 2 N. C. 654, 3 Scott, 95.

him, every one would have thought the worse of him for it: and, if so, the imputation is a matter for which he would be entitled to maintain an action; and it is not the less to be justified, because the libel couples it with something more.

CRESSWELL, J.—I also am of opinion that this plea does not justify the whole of the libel. I was at first struck with the suggestion that the alleged practising was only evidence of the crime which the plea set up by way of justification: but a little reflection has satisfied me of the fallacy of that. Suppose the libel had been confined to this,—that the plaintiff, having got into a quarrel, challenged his adversary, and spent the whole night previously to the intended duel in practising pistol firing: would this be the less disparaging to the plaintiff's character, if the libel went on to say that he afterwards went out and murdered his opponent?

TALFOURD, J.—I am of the same opinion. If the argument of Mr. *Peacock* is to have any effect, it will follow that every man who has had the misfortune to be tried for a crime, will be for ever after out of the pale of the law. The libel here,—which we all know to be written by one who is eminently a master of language,—commences by describing the trial as a remarkable one: it then speaks of a “damning piece of evidence” of which the counsel for the prosecution were said to be in possession, and even in the absence of which, it is said that the prisoner's case “looked black enough to those *who knew the law,
*131] and the character of the judge who sat to administer it.” It is quite obvious from the whole tenor of the libel, that these circumstances did make a difference in the mind of the writer of the article, as to the public estimate of the plaintiff's conduct.

Peacock prayed leave to amend his plea. He submitted that it was abundantly apparent that there was no malice; and he observed that the plaintiff had not thought fit to demur to the plea.

Keene suggested, that, if the defendants would amend by taking issue on the alleged practising, which was really the sting of the libel, he would undertake not to demur. But he submitted that the plaintiff ought not now, after the lapse of twenty years, to be virtually tried again for the alleged murder.

MAULE, J.—It would certainly be a very shocking thing that the plaintiff should be substantially tried again. The libel is obviously one that is calculated to give extreme pain to the plaintiff and his family.

JERVIS, C. J.—Mention the matter again on a future day: and we trust, that, in the mean time, the parties will have come to some understanding to prevent the case going to a jury.

An apology dictated, in the most ample and honourable terms, by the talented writer of the libellous article, was afterwards tendered by the defendants, and accepted by Captain Helsham.

Rule accordingly.

***ALDIS and Others v. MASON. June 10. [*132**

In covenant on an indenture of lease, the declaration alleged for breach, that the defendant, during the term by the indenture created, to wit, on such a day, and from thence continually for a long time, to wit, from thence hitherto, suffered the premises, and every part thereof, to be and continue, and the same were for and during all that time, ruinous and out of repair, &c.

Verdict, that the defendant did not, during the term by the indenture created, suffer the premises, or any part thereof, to be or continue, nor were the same for or during all the said time, ruinous and out of repair, &c. :—

Held, that the traverse was too large.

THIS was an action of covenant. The declaration stated that theretofore, to wit, on the 14th of October, 1850, by a certain indenture then made between the plaintiffs of the one part and the defendant of the other part,—profert,—the plaintiffs, for the considerations therein mentioned, did demise, lease, and let unto the defendant, his executors, administrators, and assigns, certain messuages and premises in the said indenture described, with the appurtenances, to have and to hold the same unto the defendant, his executors, administrators, and assigns, for the term of twenty-one years, to be computed from the 7th of April, 1850, and also certain other messuages and premises in the said indenture mentioned, with the appurtenances, to have and to hold the same unto the defendant, his executors, administrators, and assigns, for the term of eighteen years, wanting ten days, to be computed from the 7th of April, 1850: That the defendant did, in and by the said indenture, for himself, his heirs, executors, administrators, and assigns, thereby covenant, promise, and agree with the plaintiffs, their executors, administrators, and assigns, that he, the defendant, his executors, administrators, or assigns, should and would, at his and their own cost and expense, in a good, substantial, and workmanlike manner, properly repair, reinstate, restore, amend, uphold, maintain, pave, glaze, tile, purge, scour, cleanse, empty, preserve, and keep the said messuages, and every of them, and every part thereof, and at all times during the said term or terms thereby created, properly maintain, amend, uphold, and keep all and singular the said demised premises, and *every part thereof, with the walls, partitions, roofs, fences, glass [*133 and other windows, casements, window-shutters, doors, water-closets, pumps, privies, gutters, drains, sewers, and wydraughts, and all other things to the said premises belonging, in, by, and with needful and proper reparations, cleansings, and amendments whatsoever, with the appurtenances thereunto belonging, in good and tenantable repair and condition, and should and would, during the term and terms thereby created, paint or cause to be painted twice over in good oil colours every three years, all the external wood, iron, and stone work or other work, heretofore or usually painted, of or belonging to the same, and which have been or usually are painted; and also that the defendant, his executors, administrators, or assigns, should not carry

on, or permit or suffer to be carried on, in or upon the said demised premises, or any of them, or any part thereof, without the previous consent in writing of the plaintiffs, their executors, administrators, or assigns, any noxious, noisy, or offensive trade or business whatsoever, &c.: That, although the plaintiffs had always, from the time of making the said indenture hitherto, well and truly performed, fulfilled, and kept all things therein contained on their part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof: Yet that the defendant did not nor would at all times during the said term of twenty-one years by the said indenture created, properly maintain, amend, uphold, and keep all and singular the said premises by the said indenture demised, for the said term of twenty-one years, and every part thereof, with the walls, partitions, roofs, fences, glass and other windows, casements, window-shutters, doors, water-closets, pumps, privies, gutters, drains, sewers, and wydraughts, and all other things to the said premises belonging, in, by, and with needful and proper reparations, cleansings, and amendments whatsoever, *134] with the *appurtenances thereunto belonging, in good and tenant-able repair and condition, according to the form and effect of the said indenture in that behalf, but omitted and neglected so to do; and he, the defendant, after the making of the said indenture as aforesaid, and during the said last-mentioned term of twenty-one years by the said indenture created, to wit, on the 1st of November, 1850, and from thence continually, for a long time, to wit, from thence hitherto, suffered and permitted the said premises demised for the said term of twenty-one years as aforesaid, and every part thereof, to be and continue, and the same were for and during all that time ruinous, prostrate, fallen down, foul, miry, choked up, in great decay, and in bad and untenable repair and condition, for want of needful and proper reparations, cleansings, and amendments to the same, contrary to the form and effect of the said indenture, and of the covenant so made by the defendant as aforesaid: That the defendant did not nor would at all times during the said term of eighteen years wanting ten days, by the said indenture created, properly maintain, amend, uphold, and keep all and singular the said premises by the said indenture demised, for the said term of eighteen years wanting ten days, and every part thereof, with the walls, partitions, &c., and all other things to the said last-mentioned premises belonging, in, by, and with needful and proper reparations, cleansings, and amendments whatsoever, with the appurtenances thereunto belonging, in good and tenantlike repair and condition, according to the form and effect of the said indenture in that behalf, but omitted and neglected so to do: That the defendant, after the making of the said indenture as aforesaid, and during the said last-mentioned term of eighteen years, wanting ten days, by the said indenture created, to wit, on the 1st of November, 1850, and from thence

continually for a long time, to wit, from thence hitherto, suffered and permitted *the said premises demised for the said term of eighteen years, wanting ten days as aforesaid, and every part thereof, [*135 to be and continue, and the same were for and during all that time ruinous, prostrate, fallen down, &c., and in bad and untenable repair and condition, for want of needful and proper reparations, cleansings, and amendments to the same, contrary to the form and effect of the said indenture, and of the covenants so made by the defendant as aforesaid: That the defendant, during the continuance of the said demise for the said term of twenty-one years, and whilst he was so possessed of the messuages or tenements so demised for the said term of twenty-one years as aforesaid, did, without the previous consent in writing of the plaintiffs, to wit, on the 1st of April, 1851, and for a long time, to wit, from thence hitherto, permitted and suffered a certain person whose name is to the plaintiffs unknown, to carry on, and there then was during all that time carried on, in and upon a certain part of the said last-mentioned premises, to wit, a certain messuage, situate, lying, and being in Carlisle Street, in the parish of St. Matthew, Bethnal Green, and known or distinguished by the No. 9, Carlisle Street, a certain noxious, noisome, and offensive business, and a business whereby divers noxious, noisome, and unwholesome effluvia, stinks, and stench were created and made upon the said last-mentioned premises, the name and nature of which said business is to the plaintiffs unknown, contrary to the form and effect of the said indenture, and of the covenants so made by the defendant as aforesaid, &c.

Plea, to the first breach,—that the defendant did not, during the said term of twenty-one years by the said indenture created, suffer or permit the said premises so demised for the term last aforesaid, or any part thereof, to be or continue, nor were the same, *for or during all the said time*, ruinous, prostrate, fallen down, &c., for *want of [*136 needful or proper reparations, &c., concluding to the country.

To the second breach,—that the defendant did not, during the said last-mentioned term of eighteen years, wanting ten days, by the said indenture created, suffer or permit the said premises so demised as last aforesaid, or any part thereof, to be or continue, nor were the same, *for or during all the said time*, ruinous, prostrate, &c., concluding to the country.

To each of these pleas the plaintiffs demurred specially, assigning for causes,—that the traverse and denial contained in the said plea are too large, and are informal;—that the traverse and denial purport and attempt to put in issue the length of time during which the premises were so ruinous as in the breach alleged, and to compel the plaintiffs to prove a breach of covenant extending over all the time in the breach mentioned; and that the plea ought to be in the affirmative, and ought to follow the words and meaning of the covenant of the defendant in

that behalf, and is bad and objectionable on account of traversing and denying that the premises, or any part thereof, were ruinous, prostrate, fallen down, foul, miry, choked up, in great decay, or in bad or untenable repair or condition, as therein purported or attempted to be done, &c. Joinder in demurrer.

Willes, in support of the demurrer.—The pleas are bad, for attempting to put in issue the length of time over which the breaches alleged in the declaration extended. The defendant should have pleaded performance. It is no plea, to say that the premises were not out of repair during *all the time* alleged in the declaration; for, the plaintiff would have a right of action, if the premises were permitted to be out of repair during *any part* of the term. The pleas are calculated to perplex and embarrass the plaintiff.

*137] **Piggott*, contrà.(a)—The pleas are good. The precedents are both ways. In *Chitty, jun.*(b) the plea given is, that the defendant did repair, in the affirmative: but in *Chitty, sen.*,(c) it is in the negative, that the messuage, &c., were not, nor are, nor was nor is any part thereof, ruinous, &c.: and in a note it is said “The plea to the breach of covenant for not repairing, should be conformable to the breach, and may be either that the defendant did repair, &c., in the words of the covenant, or that the premises were not out of repair, as above, in the negative of the breach usually assigned in the declaration.” The traverse is not too large: it does not put the plaintiff to more proof than if time were altogether omitted. The breach states the time in two ways,—first, “during the said term,” that is, for some period during the term; and then it states it more particularly under a *videlicet*. All that follows the *videlicet*, however, is a mere cumulative allegation of time, and might be struck out as surplusage: and, if so, according to every principle of pleading, the traverse is well taken. The question is, does “during the said term” mean the whole of the term, or any part of the term. [JERVIS, C. J.—It means all the term.] If the *particular* time may be struck out of the declaration as surplusage, the *traverse would not have the effect of putting more upon *138] the plaintiff to prove than if the traverse had been properly taken. [MAULE, J.—The pleas are clearly bad.] In *Palmer v. Gooden*, 8 M. & W. 890,† 1 Dowl. N. S. 673, a plea to an action of covenant for rent due for turnpike tolls, stated, that, before the rent became due,

(a) The points marked for argument on the part of the defendant, were as follows:—“The defendant, on the argument of these demurrers, will contend that both the pleas demurred to are good, and that neither of the traverses taken by those pleas is too large, as the plaintiff would have been entitled to a verdict on the issues raised by the traverses, if they had proved that the premises were out of repair *at any time during the continuance of the term granted by the lease*.”

“The defendant also contends, that, inasmuch as the pleas demurred to traverse the breaches to which they are pleaded, in the terms used in the breaches themselves, they are perfectly correct traverses.”

(b) 2d edit., by Pearson, p. 494.

(c) 7th edit., by Greening, vol. III. p. 236.

the trustees, on, &c., entered into and upon a certain part of the tolls, and then ejected, expelled, put out, and removed the defendant from the possession thereof, and kept and continued him so ejected, &c., from thence hitherto: the plaintiff replied that the trustees did not enter into or upon the said tolls, or eject, &c., the defendant from the possession thereof, *modo et formâ*: and it was held, on error, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the replication was good, on special demurrer, although it put in issue, not only the expulsion, but also the entry,—the latter being immaterial and impossible; and that, the defendant having mixed up the entry and expulsion as constituting the eviction, the plaintiff had a right to follow him, and to accept the issue as tendered. TINDAL, C. J., there says: “It is impossible for the most acute mind to conceive such a thing as an entry upon tolls. It is admitted, therefore, that the allegation of the entry is altogether immaterial: indeed, that it is almost insensible. But a party does not make an issue upon the substantial matter to be tried by the jury bad, merely because he includes in it something of total surplusage and immateriality. No case has been cited of an expulsion from *realty*, where the issue has been held bad for also including the entry, although we have been referred to a case where the issue was held good without it. But, however that may be, the same reason cannot apply to the case of an incorporeal hereditament, as to which it seems impossible to conceive *the application of an allegation of entry. On the short ground, therefore, that [*139 *utile per inutile non vitiatur*, it appears to me, and to the rest of the court, that the judgment of the court below was wrong, and ought to be reversed.” [MAULE, J.—That the premises are out of repair, and had been so for a long time, is not an immaterial allegation. An allegation that is material never can be surplusage. Surplusage is something that is altogether foreign and inapplicable. This is rather like the case of assigning two breaches on a bond, before the statute 7 & 8 W. 3, c. 11; there, you could not say that one was surplusage; one would be no more surplusage than the other.] The particular time is immaterial. [MAULE, J.—Every portion of time is material: you must have an allegation of time explicitly or implicitly.] In *Barber v. Lemon*, 11 Q. B. 302 (E. C. L. R. vol. 63), to debt by the drawer of a bill of exchange against the acceptor, the defendant pleaded, that, before action, the plaintiff endorsed and delivered the bill to a third person, D., who then became, and then afterwards, to wit, thence hitherto, remained, the holder thereof by virtue of such endorsement: the plaintiff replied, that, at the commencement of the action, the plaintiff was the holder of the bill, without this that D. from the time the bill was so endorsed and delivered to him “hitherto,” remained the holder thereof, *modo et formâ*: and it was held, on special demurrer, that the replication was good; that it was not necessary to state how the bill, which

the plaintiff admitted that he endorsed away, came back to him; and also that the traverse was not too large, as putting in issue immaterial matter, by denying that D. was the holder from the time of endorsement "hitherto," because, if issue had been joined on the traverse, the *140] defendant would have succeeded by *proving that D. was holder at the time of the commencement of the suit.

JERVIS, C. J.—The court is of opinion that the pleas are bad, for the reasons already stated. Judgment for the plaintiff.

BUTT and JUPE v. THE GREAT WESTERN RAILWAY COMPANY. June 3.

In case against a railway company, charging them as common carriers, for the loss of a package intrusted to them to carry, subject to the terms of a special notice by the company not to be responsible for articles of certain descriptions, or of a certain value, unless entered and paid for accordingly,—the declaration alleged a loss arising from the *gross negligence of the company, and the felonious acts of their servants*:—Held, that the allegation of gross negligence and felony by servants of the company, was surplusage.

The company pleaded (except as to so much of the declaration as alleged that the loss arose from the gross negligence of the company and the felonious acts of their servants), that the goods were within the description, and of the value, mentioned in the notice, and that their nature and value were not declared at the time of their delivery to the company. The plaintiffs new assigned, that they issued their writ and declared thereupon, for that, while the goods were in the custody and possession of the company as such common carriers, they were feloniously stolen by certain servants of the company unknown to the plaintiffs:—Held, on special demurrer, that the new assignment was bad, as applying to a portion of the declaration to which the plea was not addressed.

Held, also, that a replication of felony by the company's servants only, without alleging gross negligence in the company, would have been bad.

THIS was an action upon the case. The declaration stated that the said company, before and at the time of the delivery of the plaintiffs' goods to them as thereafter mentioned, were, and from thence hitherto had been, and still were, common carriers of goods for hire from Westbury station to London: That the plaintiffs, whilst the said company were such common carriers as aforesaid, to wit, on the 20th of April, 1850, at Westbury station aforesaid, caused to be delivered to the said *141] *company, and the said company then accepted and received of and from the plaintiffs, eight trusses of silk of the plaintiffs', of great value, to wit, of the value of 2000*l.*, to be carried and conveyed by the said company, as such carriers as aforesaid, partly by the Great Western Railway, and partly by the common highways, from Westbury station aforesaid to London aforesaid, and there to be delivered by the said company for the plaintiffs, for certain reasonable reward then paid by the plaintiffs to the said company in that behalf,—subject to the terms and conditions of a certain notice then delivered by the said company to the plaintiffs, which said notice was and is in the terms following, that is to say, "The Great Western Railway Company give

public notice that they will not be accountable for any article conveyed upon their railway, unless it be entered and signed for as received by them or their agent; *nor will they be responsible for the loss of or injury to any article or articles or property of the description following*, that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, *silks in a manufactured or unmanufactured state*, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger on their railways, when the value of such article or articles, or property aforesaid, contained in *such parcel or [*142 package, shall exceed the sum of 10*l.*, unless, at the time of the delivery thereof at their office, warehouse, or receiving house, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and an increased charge, or an engagement to pay the same, be accepted by the person receiving such parcel or package; nor for the loss or damage of returned wrappers or boxes for which they make no charge for conveyance, or for any goods put into returned wrappers or boxes; nor for any goods left until called for, or to order, or left or warehoused for the convenience of the parties to whom they are consigned; nor for the loss or damage of any packages insufficiently or improperly packed, marked, directed, or described, or containing a variety of articles liable by breaking to damage each other; nor for leakage arising from bad casks or cooperage. The company will not be answerable for the loss or damage of any goods, arising from fire, civil commotion, tempest, or act of God. They will not carry *aqua fortis*, oil of vitriol, gunpowder, or other goods of a dangerous quality, unless by special agreement; and any person sending the same, without giving written notice to the company, is liable by act of parliament to a penalty of 10*l.*, which will be strictly enforced, as also the amount of damage sustained on any other goods by means of the aforesaid dangerous articles. No claim for loss or damage will be allowed, unless made within three days after the delivery of the goods. That the delivery of the goods will be considered complete when the same are unloaded out of the wagon, van, cart, or truck, and placed at the door of the consignee: and that the cellaring and ware-

housing of them will be at the owner's risk. Nor will The Great Western Railway Company be responsible for any loss *or
 *143] damage that may happen to goods sent by them, if such loss or damage happens beyond the distance of their own railways. The above conditions apply to all goods received by The Great Western Railway Company at their respective offices and warehouses in all parts of England. And, as to all goods intrusted to them, they engage to carry them on the above express conditions only. N. B.—Goods not taken from the company's warehouse within two days after notice of their arrival at the station to which they have been addressed, will be subject to the usual charges of warehouse-rent, &c.:" That the said company, as such carriers as aforesaid, then, to wit, on the day and year aforesaid, accepted and received the said goods of the plaintiffs at Westbury station aforesaid, to be carried, conveyed, and delivered by them as aforesaid, subject to the terms and conditions aforesaid; and the said company then accordingly did duly carry and convey *seven* of the said trusses of silk, from Westbury station aforesaid to London aforesaid, and there duly delivered the same for the plaintiffs, pursuant to their duty in that behalf: That at the time when the said trusses of silk were so delivered to the said company as aforesaid, the same were duly entered and signed for as received by one W. A. Tetley, the agent of the said company in that behalf, to wit, in a certain receipt in writing then signed and given by him as such agent as aforesaid to the plaintiffs: That the said goods were not, nor were any of them, put into returned wrappers or boxes, nor were the same, or any part thereof, insufficiently or improperly packed, marked, directed, or described: Yet the said company, not regarding their duty as such common carriers as aforesaid, but contriving and intending to deceive, defraud, and injure the plaintiffs in this behalf, did not nor would use due and proper care in and about the carriage and conveyance of the other of the said
 *144] eight trusses of silk of *the plaintiffs from Westbury station aforesaid to London aforesaid, nor carry or convey the same from Westbury station aforesaid to London aforesaid, nor there deliver the same for the plaintiffs, but, on the contrary thereof, the said company, so being such common carriers as aforesaid, took so little and such bad care in and about the carrying and conveying and delivering of the said other truss of silk as aforesaid, and behaved and conducted themselves in the premises with such gross negligence and carelessness, that, by and through the gross carelessness, negligence, and default of the said company in the premises, *and the felonious acts of their servants in that behalf*, the said other truss of silk of the plaintiffs, being of great value, to wit, of the value of 300*l.*, while the said company had the same for the purpose aforesaid, to wit, on the day and year aforesaid, became and was wholly lost to the plaintiffs: And the plaintiffs said that the said loss of the last-mentioned truss of silk did not arise

from fire, civil commotion, tempest, or the act of God, but from the default of the said company as aforesaid; nor did such loss happen beyond the distance of the said company's own railways, within the meaning of the said notice; and that the plaintiffs claimed the said last-mentioned truss of silk of the said company, or satisfaction for the loss thereof as aforesaid, within three days after the delivery of the said other seven trusses of silk for the plaintiffs by the said company as aforesaid, to wit, on the 22d of April, 1850; but that the said company had not delivered the same, or made any satisfaction to the plaintiffs for or on account thereof.

The declaration also contained a count in trover.

The defendants pleaded, seventhly, to the first count,—except as to so much thereof as alleged that the said truss of silk therein said to have become and been lost, became and was lost by and through the gross negligence *and carelessness of the defendants, and the felonious acts of their servants in that behalf,—that the said [*145 trusses of silk in the first count mentioned, were so as in that count mentioned delivered to the defendants at a certain office, warehouse, or receiving-house of them the defendants, as such common carriers as in that count mentioned, that is to say, at Westbury station in the said first count mentioned; and that the said trusses of silk, at the time of the said delivery thereof to the defendants, were respectively, and respectively consisted of, packages containing silks, to wit, silks in an unmanufactured state (the said silks so as aforesaid contained in such packages then being of a greater value than 10*l.*, to wit, of the value of 2000*l.* in the whole, and the said silks so as aforesaid contained in each and every of the said packages then being of greater value than 10*l.*, to wit, of the value of 250*l.*); and that, at the time of the delivery of the said trusses of silk at the said office, warehouse, or receiving-house of the defendants, for the purpose of being carried and conveyed as in the first count mentioned, the value of the said trusses of silk, or of the silks contained as aforesaid in the said packages, was not, nor was the value of any one of the said trusses of silk, nor was the value of the silks contained in any one of the said packages, declared by the plaintiffs, or by the person or persons sending or delivering the same,—verification.

The plaintiffs new assigned as follows:—And, as to the seventh plea of the defendants pleaded to the first count of the declaration, except as to so much thereof as alleges that the said truss of silk became and was lost by and through the gross negligence and carelessness of the defendants, and the felonious acts of their servants in that behalf, the plaintiffs say that they issued their writ in this action, and declared thereupon in the said first count, not for the supposed grievances to which the said seventh plea is limited and pleaded, but for that, while

*146] the said *trusses of silk were in the custody and possession of the defendants, as such common carriers, for the purpose in the said first count mentioned, to wit, on the day and year therein mentioned, the said truss of silk in the said first count lastly mentioned was feloniously stolen, taken, and carried away by certain servants then in the employ of the defendants, the names of which servants are unknown to the plaintiffs; whereby the same was not safely or securely carried, but became and was wholly lost to the plaintiffs, as in the said first count mentioned; which is another and different grievance from that to which the said seventh plea is pleaded and limited,—verification and prayer of judgment.

To this new assignment the defendants demurred specially, assigning for causes,—that it was improperly pleaded by way of new assignment, instead of replication;—that either the seventh plea was in effect pleaded to the whole declaration, and then the matter in the new assignment ought to have been pleaded by way of replication, like the replication to the sixth plea, or the seventh plea was pleaded to a portion of the declaration, excluding felony, and then the new assignment was improper, as repeating a portion of the declaration to which the plea was not pleaded;—and that, under the circumstances disclosed in this branch of the record, the defendants were not necessarily liable for felony of their servants.

The plaintiffs joined in demurrer.

Willes, in support of the demurrer.—Under such a notice as is set out upon this record, the common carrier is protected, unless he be guilty of *gross* negligence. Felony of a servant, *per se*, would not render him liable: it is only when coupled with something else, that it amounts to evidence of gross negligence. If so, this new assignment *147] is clearly bad, as being a new *assignment of evidence of something which ought to have been replied in some way or other. The new assignment is likewise open to an objection in point of form. The exception in the plea is of something which the court on a former occasion decided to be surplusage. [MAULE, J.—The declaration complains generally of a loss. The defendants say, you complain of a loss which may comprehend a loss by the felonious acts of our servants; in so far, therefore, as it may comprehend that, our plea is not addressed to it; but, in so far as it does not, our plea is an answer to the charge. The plaintiff cannot new assign a loss by felony.] Clearly not: it is merely adding another fact, showing a new character of loss, not alleging a new and different cause of action. [MAULE, J.—Like a new assignment of excess, to a plea of *son assault demesne*.] Not quite: that alters the quantity but not the quality of the act. [MAULE, J.—A common carrier is liable to an action for not properly carrying and delivering goods intrusted to him: but he is not liable, generally speaking, if the owner of the goods fails to give the information which the

special notice requires. He is, however, liable, notwithstanding such failure, in the aggravated case of his keeping felonious servants. But that should be replied, and not new assigned.] Had this been a case under the carriers' act, 11 G. 4 & 1 W. 4, c. 68, the felony of the defendants' servants would, under s. 8, have been a good answer to the plea. *Bradley v. Waterhouse*, M. & M. 154 (E. C. L. R. vol. 22), was cited on the former argument, to show that the notice will not protect the carrier against liability for a loss arising from felony of his servants. The marginal note of the report is not quite borne out by Lord TENTERDEN's judgment: the point really decided,—and for which alone the case is cited in *Story on Bailments*, § 78, and also in *Angell on Carriers*, § 261, a book *of great repute in America,—was, [*148 that the carrier was not liable for a loss by felony of his servant, where the owner of the package stolen had so endeavoured to conceal the nature and character of the article, as to prevent the carrier from taking any *particular* care of it. [MAULE, J.—Lord TENTERDEN relies, not merely upon a *suppressio veri*, but also upon a *suggestio falsi*. He seems to put it like a case of running down, where the plaintiff loses his remedy if he has himself contributed to the injury.(a) He evidently considered the plaintiff as the person who had occasioned the loss, by his misrepresentation of the nature of the article.] The plaintiff should have replied that the loss was occasioned by the gross negligence of the defendants,—relying upon the felony as evidence of gross negligence. In *Finucane v. Small*, 1 Esp. N. P. C. 315, it was held, that, where goods are bailed to be kept for hire, the bailee is only bound to take the same care of them as he would of his own; and therefore, if they are stolen by the bailee's servants, without gross negligence on his part, the bailee is not liable. “To support an action of this nature,” says Lord KENYON, “positive negligence must be proved. It has appeared in evidence in this case, that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that it is incumbent on the defendant to do; and, if such goods are stolen by the defendant's own servants, that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own.”

Needham (with whom was *J. Brown*), contra.—Felony is expressly excepted by the carriers' act, the 8th section of which provides “that nothing in this act shall be *deemed to protect any mail-con- [*149 tractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant, from liability for any loss or injury occasioned by his or their own personal neglect

(a) See *Thorogood v. Bryan*, 8 C. B. 115 (E. C. L. R. vol. 65).

or misconduct." It is impossible, therefore, to contend that the defendants could, by any notice, relieve themselves from the express liability cast on them by the statute. [CRESSWELL, J.—The statute imposes no express liability: it relieves the carrier from the necessity of proving the notice; and then it restricts that relief in certain cases. MAULE, J.—It is emphatically a *carriers'* act: it gives them the benefit of the notice, except in cases of gross and wilful neglect.] It leaves them liable for the wrongful taking by their servants. In Story on Bailments, § 570, speaking of these notices, the learned author says,—“It is clear that such notices will not exempt the carrier from any losses by the malfeasance, misfeasance, or gross negligence of himself or his servants. If, therefore, he or they convert the goods to a wrong use; or, if he or they make a wrong delivery to a person not entitled to them; or, if he or they are guilty of gross negligence in the carriage or care of them; the loss must be borne by the carrier, notwithstanding his notice, for, the terms are uniformly construed not to exempt him from such losses.” Before the act, it will not be denied that carriers were liable for the felonious acts of their servants. [MAULE, J.—They were liable for the non-delivery of the goods.] If so, the substance of this replication, or new assignment, be it which it may, is good. *Bradley v. Waterhouse* shows that, notwithstanding the notice (before the act), the carrier was liable for felony of his servants. Here, it is alleged that the loss

*150] *so occurred. [CRESSWELL, J.—Put the carriers' act out of consideration. Before the statute, the carrier was an insurer. Does the act relieve him from all liability as an insurer, except for gross negligence? Is the allegation that the loss arose from felony by the defendants' servants any answer to the plea setting up a notice which restricts the liability of the defendants to the case of gross negligence? By your answer you set up, not gross negligence, but felony. *Finucane v. Small* is an authority that the carrier is not liable for felony, unless he has been guilty of gross negligence.] The superaddition of the special contract does not alter the character of the bailment. [JERVIS, C. J.—In *Wyld v. Pickford*, 8 M. & W. 443,† it was held, that, where a carrier receives valuable goods to carry, after notice to the bailor that he will not be responsible for loss or damage to them unless a higher than the ordinary rate of insurance be paid for the carriage, he receives them on the terms of such notice, which amounts to a special contract; but that he is not exempted thereby from all responsibility, but is, notwithstanding the notice, bound to take ordinary care in the carriage of the goods, and is liable, not only for any act which amounts to a total abandonment of his character of a carrier, or for wilful negligence, but also for a conversion by a mis-delivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care.] *Hinton v. Dibbin*, 2 Q. B. 646 (E. C. L. R. vol. 42), 2 Gale & D. 36, shows that the carrier is not liable for

a loss arising from gross negligence of his servants: the felony, therefore, is the material thing. [MAULE, J.—You say this is a declaration for non-delivery of goods: the defendants say, they accepted the goods upon a condition which you did not comply with; to which you answer, that your claim is in respect of something which is *unaffected [*151 by the notice. [JERVIS, C. J.—If *Finucane v. Small* is good law, a replication of felony clearly would be bad.] As an insurer, the carrier is absolutely liable, notwithstanding a loss by felony of his servants. [CRESSWELL, J.—If the notice is sufficient, as you seemed to concede it to be, to relieve the carrier from liability in all cases except where he has been guilty of gross negligence, it relieves him from liability for the felony of his servants, provided he has not been guilty of gross negligence.] Is it not always evidence of gross negligence, that an insurer of goods loses them by the felony of a servant? [MAULE, J.—Clearly not. JERVIS, C. J.—If it were so, you should have replied gross negligence, and not contented yourself with stating that which you say is evidence of it.] The law clearly imposes upon a carrier the duty of employing honest servants. [MAULE, J.—Can you say that the simply hiring a servant who afterwards turns out to be a thief, is evidence of gross negligence? JERVIS, C. J.—Mr. Justice STORY, in § 335, cites *Finucane v. Small*, and says,—“If, indeed, the circumstances of the case prove that the theft has been occasioned by negligence, or want of proper caution, there the pawnee may properly be held responsible.” Sect. 454 seems to explain the whole matter. “In respect to depositaries for hire,” it is said, “there seem some discrepancies in the authorities, whether the *onus probandi* of negligence lies on the plaintiff, or of exculpation on the defendant, in a suit brought for the loss. In England, the former rule is maintained.(a) In America, an inclination the other way has been expressed.”(b) The result is, that a replication of felony would be no answer to the plea.] In STORY, § 531, it is said,—“The case of *Barcroft*, as cited by Lord Chief Justice ROLLE, would seem to imply a *responsibility of the carrier even [*152 in cases of jettison. It is stated thus:—‘A box of jewels had been delivered to a ferryman, who knew not what it contained, and, a sudden storm arising in the passage, he threw the box into the sea: yet it was resolved that he should answer for it.’(c) Sir W. JONES suspects that there must have been some proof of culpable negligence in the case, and that probably the casket was both small and light enough to have been kept longer on board than other goods. Even then, the case would be sufficiently hard; as, the ferryman did not know the contents, and might have acted for the best. But, if the doctrine of the

(a) Citing *Finucane v. Small*, 1 Esp. N. P. C. 315; *Harris v. Packwood*, 3 Taunt. 264; *Marsh v. Horne*, 5 B. & C. 322, 327 (E. C. L. R. vol. 11), 8 D. & R. 223 (E. C. L. R. vol. 16).

(b) Citing *Platt v. Hibbard*, 7 Cowen's R. 497, 500.

(c) STORY cites *Aleyn's R.* 22 (but this is a mistake; the case is *Bird v. Astcock*, 2 Bulstr. 28; *Le case de Gravesend-Barge*, 1 Roll. Rep. 79, 2 Roll. Abr. 567); JONES on Bailments, 107, 108.

case be, that jettison will not in a clear case of necessity discharge the carrier, it is not law; for, it was expressly decided in Lord COKE's time, in the case of a bargeman, that, where goods were thrown overboard in a great storm, to save the lives of the passengers, by lightening the barge, the bargeman was exonerated; for, the storm was the act of God, and the occasion of throwing them overboard." This is a case of misfeasance. [MAULE, J.—Yes: on the part of the felon.] The argument on the other side assumes that the special notice reduces it to the case of an ordinary bailment. That clearly is a fallacy. [MAULE, J.—Neither the carriers' act nor the special contract brings the defendants into the position of ordinary bailees for hire. They still are common carriers, and liable to all the duties of common carriers, except so far as they are qualified by the statute, where the statute applies, or by the special contract, where the special contract applies. If the plaintiff could reply that the loss was occasioned by the wilful act or gross negligence of the defendants, it would probably be a good answer to the plea. But, to say that the thing was lost by the felonious act *153] of the *defendants' servants, is no answer to a plea founded upon the condition contained in the special contract. The defendants have a right to say, in terms, that they will not be liable for silk. The plea is a good one, and the replication bad in substance. JERVIS, C. J.—I think the plaintiff ought to be allowed to amend, by replying a loss through gross negligence.] Felony *and* gross negligence. [MAULE, J.—Amend, by replying a loss by felony, and that such felony arose through the gross negligence of the defendants.]

Willes undertook not to demur to such a replication.

Leave to amend accordingly, on payment of costs, within a fortnight; otherwise judgment.

A common carrier may limit his liability by a special contract, though not for losses arising from negligence; and where there is a special acceptance, the *onus* of showing, not only that the cause of the loss was within the terms of

the exception, but also that there was no negligence, lies on the carrier: *Swindler v. Hilliard*, 2 Richardson, 286; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Howard U. S. Rep. 344; *Laing v. Calder*, 8 Barr, 479.

NEWMAN *v.* GRAHAM. *June 2.*

Where the defendant has duly obtained a rule for a special jury, and the jury has been struck and reduced, it is not competent to the court to direct that the cause be tried by a common jury, on the defendant's failure to summon a special jury.

BRAMWELL, for the plaintiff, moved for a rule calling upon the defendant to show cause why this cause should not be tried in its order, and by a common jury, unless the defendant should cause a special jury to be summoned. It appeared that the rule for a special jury was obtained, and that the jury had been duly struck and reduced, but that, when the cause was called on, it was found that no jury had been summoned. [JERVIS, C. J.—Why did not the plaintiff summon the special jury?] He swears that he was not aware of the defendant's default, and his attorney was uninformed as to the practice. [CRESSWELL, J.—The statute^(a) is imperative, that the jury struck shall be the jury to try the *issue.] The Court of Exchequer has [*154 repeatedly done that which is now asked.

JERVIS, C. J.—And so has this court; but not very recently. It is not competent to any court to repeal a positive enactment of the legislature. The practice on the subject is quite settled.^(b)

The rest of the court concurring,

Rule refused.

(a) 3 G. 2, c. 25, s. 15.

(b) See *Breach v. O'Brien*, 9 C. B. 227, and the cases there referred to. In *Dawson v. Smith*, 1 L. M. & P. 151, it is said, that a special jury rule does not deprive a party of his right to the common jury process, until a special jury has been struck.

And see *Devanage v. Borthwick*, 2 L. M. & P. 277.

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RICHARDSON *v.* The SOUTH EASTERN RAILWAY COMPANY. *June 10.*

A party whose land has been "damaged or injuriously affected" by the execution of the works of a railway company, and who, in a proceeding initiated by himself under the 68th section of the lands clauses consolidation act, 8 & 9 Vict. c. 18, recovers by the verdict of a jury a larger sum than that tendered by the company, is entitled to the costs of the inquiry before the sheriff,—the earlier provisions of the statute as to the manner of assessing compensation, being virtually incorporated in that section.

THIS was an action of debt. The declaration stated, that, before and at the time of the giving the notice thereafter next mentioned, and after the passing of the lands clauses consolidation act, 1845, and after the passing of the railways clauses consolidation act, 1845, and after the passing of a certain other act of parliament made and passed in the session of parliament holden in the ninth and tenth years of the reign of Her present Majesty, intituled "An act to make a railway from The London and Greenwich Railway to Woolwich and Gravesend," the plaintiff was seised of the inheritance

*155] *in fee-simple in possession of an estate situate and being in Marshall's Grove, Woolwich, in the county of Kent, and adjoining the south side of the said railway authorized to be constructed, and constructed, by the defendants, under and by virtue of the provisions of the said last-mentioned act, consisting of nine messuages or cottages, with the gardens and yards in the rear thereof, and being No. 1 to No. 9 inclusive in the said Marshall's Grove: That, by reason of the last-mentioned railway having intersected and cut off the roadway adjoining the north side of the said estate of the plaintiff, and having thereby destroyed or obstructed the immediate approaches thereto; and also by the execution of the works by the last-mentioned act authorized to be executed, and by the construction of the said last-mentioned railway, the said estate of the plaintiff was greatly damaged and injuriously affected: That, before the giving of the said notice hereinafter next mentioned, to wit, on the 1st of January, 1849, the defendants took possession of and seized and converted to the purposes of their aforesaid railway, or the works connected therewith, a piece of ground at the North East angle of one of the aforesaid messuages or cottages, by reason whereof the said estate of the plaintiff was further greatly damaged and injuriously affected, and the plaintiff, by reason of the several premises aforesaid, sustained a loss, and claimed to be entitled to compensation in respect thereof from the defendants, to an amount exceeding 50*l.*, to wit, to the amount of 1000*l.*: That, afterwards, the plaintiff being so interested in the said estate, and the same being so injuriously affected as aforesaid, and the plaintiff having sustained such loss as aforesaid, and being entitled to compensation in respect thereof as aforesaid, and being desirous of having the question of compensation settled by a jury, to wit, on the 9th of March, 1850, he the plaintiff

*156] did give a notice in writing *to the defendants, and did thereby and therein state to the defendants the said nature of his interest in the said hereditaments in respect of which he claimed compensation, and that he claimed from the defendants compensation in respect of the said loss and injury, and that 1000*l.* should be paid by the defendants to him the plaintiff for such compensation; and the plaintiff did also by the said notice state to the defendants that it was the desire of him, the plaintiff, that the question of the aforesaid compensation should be settled by a jury in the manner pointed out in that behalf by the lands clauses consolidation act, 1845, unless the defendants should be willing to pay the aforesaid amount of 1000*l.* as compensation, which the plaintiff thereby claimed, and enter, within the time limited by the said statute in that behalf, into an agreement for that purpose: That the defendants afterwards, to wit, on the 20th of March, 1850, gave to the plaintiff a certain notice in writing, whereby, after reciting the said notice so given by the plaintiff to the defendants as aforesaid, they the defendants made known to the plaintiff that they the defendants

were ready and willing, and thereby offered, to pay to the plaintiff the sum of 60*l.* in satisfaction and discharge of the injury and damage alleged to have been sustained by the plaintiff, and in respect of which the said sum of 1000*l.* was so claimed by the plaintiff as aforesaid: That the defendants did not nor would pay the amount of compensation so claimed by the plaintiff as aforesaid, nor did nor would enter into a written agreement for that purpose: That the defendants, within twenty-one days after the receipt of the said first-mentioned notice to them so given as aforesaid, to wit, on the 28th of March, 1850, did, according to the form of the first-mentioned statute, issue their certain warrant in writing, under the common seal of the defendants, and directed to the sheriff of the county of Kent, whereby, *after reciting and referring to the several notices aforesaid, the defendants, pursuant to the powers and authorities given to them [*157 by the statutes in that behalf, required the said sheriff to nominate and summon a special jury to inquire of and assess the compensation, if any, to be paid to the plaintiff in respect of the several supposed matters in his said notice alleged, or any of them, in respect whereof he had therein claimed compensation; and the defendants did by their said warrant further require the said sheriff to issue such summons, and do all such things in relation to the said trial or inquiry, as were authorized and required to be done by the lands clauses consolidation act, 1845, and by the said company's act: That afterwards, to wit, on the 24th of April, 1850, within the said bailiwick of the said sheriff, to wit, at Woolwich, in the county of Kent, a certain inquisition was taken in pursuance of and in accordance and compliance with the last-mentioned request, before Matthew Bell, Esq., then being sheriff of the said county of Kent, by A. B., C. D., &c., twelve honest, lawful, sufficient, and indifferent men of the said county, qualified to serve on juries for trials of issues in Her Majesty's courts of record at Westminster who were duly impannelled, summoned, returned, and drawn pursuant to the provisions of the statute in that behalf, by the said Matthew Bell, at the time of the said request, and then, being sheriff of the said county of Kent as aforesaid, and who were by and before such sheriff, at the time and place last aforesaid, duly sworn to inquire of and concerning the matters in the said warrant in that behalf mentioned, and thereby referred to, to be inquired of, assessed, ascertained, and determined by them, in manner therein mentioned; and the plaintiff and the said defendants, by their counsel respectively, having, at the time and place of the holding of the said inquisition, appeared before the said sheriff and the said jurors, and *having respectively adduced [*158 evidence before the said sheriff and jurors touching the matters so in question as aforesaid, the said jurors, upon their oath did find their verdict that the plaintiff had sustained damages to the amount of 215*l.*, by means of the several matters mentioned in his said notice, and that

*155] *in fee-simple in possession of an estate situate and being in Marshall's Grove, Woolwich, in the county of Kent, and adjoining the south side of the said railway authorized to be constructed, and constructed, by the defendants, under and by virtue of the provisions of the said last-mentioned act, consisting of nine messuages or cottages, with the gardens and yards in the rear thereof, and being No. 1 to No. 9 inclusive in the said Marshall's Grove: That, by reason of the last-mentioned railway having intersected and cut off the roadway adjoining the north side of the said estate of the plaintiff, and having thereby destroyed or obstructed the immediate approaches thereto; and also by the execution of the works by the last-mentioned act authorized to be executed, and by the construction of the said last-mentioned railway, the said estate of the plaintiff was greatly damaged and injuriously affected: That, before the giving of the said notice hereinafter next mentioned, to wit, on the 1st of January, 1849, the defendants took possession of and seized and converted to the purposes of their aforesaid railway, or the works connected therewith, a piece of ground at the North East angle of one of the aforesaid messuages or cottages, by reason whereof the said estate of the plaintiff was further greatly damaged and injuriously affected, and the plaintiff, by reason of the several premises aforesaid, sustained a loss, and claimed to be entitled to compensation in respect thereof from the defendants, to an amount exceeding 50*l.*, to wit, to the amount of 1000*l.*: That, afterwards, the plaintiff being so interested in the said estate, and the same being so injuriously affected as aforesaid, and the plaintiff having sustained such loss as aforesaid, and being entitled to compensation in respect thereof as aforesaid, and being desirous of having the question of compensation settled by a jury, to wit, on the 9th of March, 1850, he the plaintiff

*156] did give a notice in writing *to the defendants, and did thereby and therein state to the defendants the said nature of his interest in the said hereditaments in respect of which he claimed compensation, and that he claimed from the defendants compensation in respect of the said loss and injury, and that 1000*l.* should be paid by the defendants to him the plaintiff for such compensation; and the plaintiff did also by the said notice state to the defendants that it was the desire of him, the plaintiff, that the question of the aforesaid compensation should be settled by a jury in the manner pointed out in that behalf by the lands clauses consolidation act, 1845, unless the defendants should be willing to pay the aforesaid amount of 1000*l.* as compensation, which the plaintiff thereby claimed, and enter, within the time limited by the said statute in that behalf, into an agreement for that purpose: That the defendants afterwards, to wit, on the 20th of March, 1850, gave to the plaintiff a certain notice in writing, whereby, after reciting the said notice so given by the plaintiff to the defendants as aforesaid, they the defendants made known to the plaintiff that they the defendants

were ready and willing, and thereby offered, to pay to the plaintiff the sum of 60*l.* in satisfaction and discharge of the injury and damage alleged to have been sustained by the plaintiff, and in respect of which the said sum of 1000*l.* was so claimed by the plaintiff as aforesaid: That the defendants did not nor would pay the amount of compensation so claimed by the plaintiff as aforesaid, nor did nor would enter into a written agreement for that purpose: That the defendants, within twenty-one days after the receipt of the said first-mentioned notice to them so given as aforesaid, to wit, on the 28th of March, 1850, did, according to the form of the first-mentioned statute, issue their certain warrant in writing, under the common seal of the defendants, and directed to the sheriff of the county of Kent, whereby, *after reciting and referring to the several notices aforesaid, the defendants, pursuant to the powers and authorities given to them [*157 by the statutes in that behalf, required the said sheriff to nominate and summon a special jury to inquire of and assess the compensation, if any, to be paid to the plaintiff in respect of the several supposed matters in his said notice alleged, or any of them, in respect whereof he had therein claimed compensation; and the defendants did by their said warrant further require the said sheriff to issue such summons, and do all such things in relation to the said trial or inquiry, as were authorized and required to be done by the lands clauses consolidation act, 1845, and by the said company's act: That afterwards, to wit, on the 24th of April, 1850, within the said bailiwick of the said sheriff, to wit, at Woolwich, in the county of Kent, a certain inquisition was taken in pursuance of and in accordance and compliance with the last-mentioned request, before Matthew Bell, Esq., then being sheriff of the said county of Kent, by A. B., C. D., &c., twelve honest, lawful, sufficient, and indifferent men of the said county, qualified to serve on juries for trials of issues in Her Majesty's courts of record at Westminster who were duly impannelled, summoned, returned, and drawn pursuant to the provisions of the statute in that behalf, by the said Matthew Bell, at the time of the said request, and then, being sheriff of the said county of Kent as aforesaid, and who were by and before such sheriff, at the time and place last aforesaid, duly sworn to inquire of and concerning the matters in the said warrant in that behalf mentioned, and thereby referred to, to be inquired of, assessed, ascertained, and determined by them, in manner therein mentioned; and the plaintiff and the said defendants, by their counsel respectively, having, at the time and place of the holding of the said inquisition, appeared before the said sheriff and the said jurors, and *having respectively adduced [*158 evidence before the said sheriff and jurors touching the matters so in question as aforesaid, the said jurors, upon their oath did find their verdict that the plaintiff had sustained damages to the amount of 215*l.*, by means of the several matters mentioned in his said notice, and that

the defendants should pay to the plaintiff the said sum of 215*l.*; and the said sheriff did then and there, accordingly, pursuant to the statute in that behalf, give judgment for the said sum of 215*l.* so assessed by the said jury, to be paid by the defendants to the plaintiff according to the provisions of the said statutes; and the said verdict and judgment were then and there, to wit, at the time and place of holding the said inquiry as aforesaid, duly signed by the said sheriff: That, the said verdict and judgment, being so duly signed as aforesaid, were afterwards, and before the commencement of this suit, to wit, on the 1st of May, 1850, duly deposited and left by the said sheriff with the clerk of the peace of the said county of Kent, to be by him kept, and the same are now by him kept, amongst the records of the Quarter Sessions of the said county of Kent, and the said verdict and judgment still remained among the records of the said Quarter Sessions of the said county of Kent, in full force and effect, and in no wise satisfied, reversed, or annulled: That the said sum of 215*l.* for which the verdict of the jury was so given as aforesaid, was and is a greater sum than the said sum of 60*l.* so previously offered by the defendants as aforesaid; by reason whereof the defendants became and were liable to pay to the plaintiff his the plaintiff's costs of the said inquiry: That afterwards, and before the commencement of this suit, to wit, on the 1st of June, 1850, the plaintiff's costs of the said inquiry were settled by Richard Goodrich, then being one of the masters of the Court of Queen's Bench at Westminster, at a certain sum, to wit, the sum of 243*l.* 1*s.* 3*d.*,—of

*159] all which the defendants, *afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice: By reason of which said premises, and by force of the statutes in that behalf, an action had accrued to the plaintiff to demand and have of and from the defendants the said sum of 215*l.*, and also the said sum of 243*l.* 1*s.* 3*d.*, amounting in the whole to the sum of 458*l.* 1*s.* 3*d.*, being the sum above demanded; yet that the defendants had not paid the said sum above demanded, &c.

The defendants pleaded, as to so much of the declaration as related to the said sum of 215*l.*, parcel, &c., payment into court: and, as to the residue of the declaration, demurred generally.

The plaintiff joined in demurrer.

*160] *Channell*, Serjt., in support of the demurrer.(a)—The *plaintiff has proceeded before the sheriff for the value of land taken

(a) The ground of demurrer marked in the margin of the demurrer book, was,—“that the claimant is not by the lands clauses consolidation act, 1845, entitled to costs in any case where a jury has been summoned in compliance with a notice from the claimant, under the 68th section of that act.”

The defendant's “points” were as follows:—

“That the proceedings mentioned in the declaration were proceedings initiated by, and consequent upon, the notice given by the claimant under the 68th section of the lands clauses consolidation act, 1845, and that the inquiry mentioned in the declaration was a proceeding wholly
: that section :

by The South Eastern Railway Company, and for damage done to land not taken, under the 68th section of "the lands clauses consolidation act, 1845," 8 & 9 Vict. c. 18. That section enables the claimant to initiate the proceedings, obliging the company, if they omit to issue a warrant to summon a jury within twenty-one days after demand, to pay the amount claimed; the object of the section being, to supersede the old proceeding by *mandamus*. The question intended to be raised here, is, whether this 68th section gives the claimant a right to the costs of the proceeding. It will hardly be contended that that section alone has that effect: but it will be insisted, on the part of the plaintiff, that the 68th section incorporates within it certain prior clauses which give the claimant a right to costs. On the part of the company, it is submitted that this is *casus omissus*, and that the earlier sections, which relate to cases where the proceedings are initiated by the company, are not incorporated in the 68th. That section enacts, "that, if any party shall be entitled to any compensation in respect of any lands, or of any interests therein, which shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated *therewith, and, [*161 if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking, of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided: or, if the party so entitled as aforesaid shall desire to have such question of compensation settled by a jury, it shall be lawful for

"That the said inquiry was not 'such' inquiry as is mentioned in the 51st section of the same statute; which section refers to an inquiry initiated by the company, and where such notice by the company has necessarily been given as is required by the 38th section:

"That, it having been decided that the 38th section does not apply in the case where the notice is given by the claimant under the 68th section, it follows that the 51st section is also inapplicable in such a case, as there is not in such a case any previous offer of compensation by the company with reference to which the costs can be imposed or apportioned, according to the provision of the 51st section:

"That there is no statutory provision relative to the costs of an inquiry under the 68th section.

"That, although it is alleged in the declaration, that, after the giving of the notice by the claimant under the 68th section, an offer was made by the company, such offer was not an offer made in pursuance of the statute, and, having been wholly unnecessary and superfluous, does not affect the rights or liabilities of either party:

"That it appears that the verdict of the jury was given for a much less sum than the amount of compensation claimed by the claimant in his notice."

him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same *in the manner herein provided*, and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid, the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts." The manner of proceeding to assess compensation is regulated by the 38th, and several subsequent sections. The 38th section enacts, that, "before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' *162] notice to the other party of their intention to *cause such jury to be summoned, and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works." The 39th section provides, that, "in every case in which any such question of disputed compensation shall be required to be determined by the verdict of a jury, the promoters of the undertaking shall issue their warrant to the sheriff, requiring him to summon a jury for that purpose, and such warrant shall be under the common seal of the promoters of the undertaking if they be a corporation, or, if they be not a corporation, under the hands and seals of such promoters, or any two of them; and, if such sheriff be interested in the matter in dispute, such application shall be made to some coroner of the county," &c. Sections 41, 42, and 48, relate to the summoning, impannelling, and swearing the jury. The 49th section provides that the sums to be paid for the purchase of lands, and for damage, shall be assessed separately. By s. 50, the verdict and judgment are to be recorded by the clerk of the peace. The 51st section enacts, that, "on every *such* inquiry before a jury, where the verdict of the jury shall be given for a *greater sum than the sum previously offered* by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but, if the verdict of the jury be given for the *same or a less sum* than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one-half of the costs of summoning, impannelling, and returning the jury, and of taking the inquiry, and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the

*other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry." The mode of ascertaining the amount of the costs is provided for by s. 52, which enacts that "the costs of any *such* inquiry shall, in case of difference, be settled by one of the masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party; and such costs shall include all reasonable costs, charges, and expenses incurred in summoning, impanneling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attorneys, recording the verdict and judgment thereon, and otherwise incident to such inquiry." The 53d section provides for the mode of enforcing payment of the costs; and the 54th for the summoning a special jury. All these sections relate to inquiries in which the promoters of the undertaking themselves initiate the proceedings: in that case, they are bound in their notice to state the amount they are willing to pay for lands which they propose to take, or for injury which may be done by works which they propose to execute. Speaking of the 68th section, Lord COTTENHAM, in the case of *The London and North Western Railway Company v. Smith*, 1 M.N. & G. 216, 222, 1 Hall & T. 364, 373, says: "The provision in question appears to have been introduced for the purpose of avoiding a *mandamus*: but those who introduced it were not aware of the whole extent or consequences of what they were doing. When a company could only be compelled to go before a sheriff by a *mandamus*, the court decided the right to compensation, on the application for the *mandamus*. The law, therefore, as it then stood, provided the means by which the preliminary question of right might be decided, before the question of the amount of damage was *investigated. Then [*164 comes an act of parliament, which, for the purpose of correcting a supposed evil, creates a much greater one, by preventing the company from having the means of ascertaining the preliminary question of right, before they go to the sheriff's jury to assess the amount." There may have been good reason, therefore, for imposing costs upon the company in the one case, and not in the other. The 68th section came under the consideration of the Court of Queen's Bench in a case of *Railstone v. The York, Newcastle, and Berwick Railway Company*, 15 Q. B. 404 (E. C. L. R. vol. 69), where it was held that the promoters of the undertaking were not bound to give the ten days' notice under s. 38, where the claimant was proceeding to enforce compensation under s. 68. If the 38th section is not incorporated in the 68th for that purpose, there can be no reason for holding it to be so for the purpose of costs. The legislature was there giving the claimant something which he was not entitled to before: if they had intended that this highly penal clause should be made still more penal against the company, by visiting them with costs, they would have said so in terms. [MAULE, J.—The

most penal clause is accompanied with a direction to pay costs. JERVIS, C. J.—What sense do you give to the words “in manner herein provided?” If you apply them to the last antecedent, that will include the right to costs.] They apply only to the mode of summoning the jury. [JERVIS, C. J.—That clearly will exclude too much. I think those words incorporate the whole of the preceding provisions which are applicable to the “settling the amount of compensation.”] The court will pause before they hold that the promoters are bound in every case to make a tender. [JERVIS, C. J.—Possibly the legislature may have intended to compel them in every case to make a tender, for the purpose *of making the clauses as to costs apply.] If so, *quod* *165] *voluerunt non dixerunt*. Costs are not of necessity incident to compensation. [MAULE, J.—Surely the “manner herein provided,” means the whole manner.] A similar question to this arose in *Corrigall v. The Blackwall Railway Company*, 5 M. & G. 219 (E. C. L. R. vol. 44), 6 Scott, N. R. 241, upon words very similar to those of the 51st section of this act, in the Blackwall railway acts, 6 & 7 W. 4, c. cxxxiii. s. 27, and 2 & 3 Vict. c. xcv. s. 22; and this court held that the claimant under the second act was not entitled to costs, by virtue of the mere words of reference in the second act, under which his claim was made,—treating it as a case for which the legislature had omitted to provide.

Butt (with whom was *Hugh Hill*), *contra*.—The plaintiff is clearly entitled to the costs of the inquiry. The 68th section incorporates within it all the provisions of the previous sections which are applicable to the mode of assessing compensation. It is a fallacy to say that the earlier sections all relate to cases where the proceedings are initiated by the company. Section 21, and several following sections, apply to *all* cases of compensation by means of a jury or by arbitration: and s. 34, which prescribes how the costs shall be borne in cases of arbitration, plainly shows what must have been the intention of the legislature. Standing alone, s. 68 would be altogether inoperative and useless. The case of *Railstone v. The York, Newcastle, and Berwick Railway Company* has no immediate bearing upon this question: and the decision is very much depreciated by the very apt and stringent dissentient remarks in the judgment of Mr. Justice COLERIDGE. “There is,” he says, “a code of clauses collected together under one head, viz. the purchase *166] of lands otherwise than by agreement; and both *sections 38 and 68 are included under that head. Section 38 is the first of a series of clauses regulating the manner in which compensation is to be settled by a jury. One would say that the whole of that series would apply to juries summoned to assess disputed compensation under all circumstances, whether the land was actually taken or only intended to be taken; and the words used in section 38 are large enough to embrace both branches. Section 68 is confined to the case of land actually taken:

but, do not the jury clauses contained in the previous sections also apply to a jury summoned under section 68? Some of them clearly do; for, the warrant is to issue 'to summon a jury for settling the same in the manner herein provided;' and, if some apply, why should not section 38 also apply?" *Corrigall v. The Blackwall Railway Company* arose under totally different circumstances, and can hardly as to this point be considered a satisfactory authority: see *Regina v. The London and Blackwall Railway Company*, 3 D. & L. 399.

Channell, Serjt., in reply.—If the liability to costs is to be based upon the 38th section, irrespective of the 68th, this decision will certainly conflict with that of the Court of Queen's Bench in *Railstone v. The York, Newcastle, and Berwick Railway Company*. It is submitted, however, that the word "such," in section 51, is to be read as a word of limitation, confining the operation of that clause to the provisions which precede it. The recent case of *Lawrence v. The Great Northern Railway Company*, 20 Law Journ., N. S., Q. B. 293, will be found to have some bearing upon the question.

JERVIS, C. J.—The declaration in this case claims *two sums of money,—the one for the compensation awarded to the plaintiff by the jury in respect of the injury done him by the company,—the other being the costs of the inquiry; the plaintiff having recovered by the award of the jury a larger sum than the amount tendered to him by the company. The defendants have paid the first sum (215*l.*) into court; and they have demurred to so much of the declaration as relates to the 243*l.* 1*s.* 3*d.* costs. I am of opinion that the plaintiff is entitled to the costs resulting from the act of parliament, and consequently that he is entitled to judgment on this demurrer. If the defendants had initiated the proceedings, and, instead of setting the claimant at defiance, had given him the notice under s. 38, it is plain that they must have paid the costs. And it is equally plain, that, if the plaintiff had claimed to have the compensation assessed by a jury, and the defendants had failed to issue a warrant for a jury within twenty-one days, they would have been liable to costs under s. 68. There are two cases, therefore, in which the defendants are clearly liable to costs,—in one of which they have acted fairly, and given the party notice. It would be strange, if, in the third case, where they hold the claimant at defiance, and issue their warrant to summon a jury, if the claimant recovers a larger sum than they have offered, they should not pay the costs of the inquiry. If this had been an oversight, a *casus omissus*, the consequence I have mentioned, however absurd and unjust, must have followed. But if the court think it would be absurd and unjust to put such a construction upon the act as will deprive the plaintiff of his costs, and the words will admit of a construction which will prevent such absurdity and injustice, the court would be well warranted in adopting it. It seems to me that the words of the act are plain, and that we may fairly hold that the

words "in manner herein provided," in the 68th section, incorporate all the *previous provisions, as if the company themselves were the *168] moving party. Looking at the language of the 38th and 39th sections, I think it plainly applies to *any* case of disputed compensation, and that we shall be doing less violence to the words of the legislature in so holding, than if we were to limit them in the way we are called upon by the defendants to do. I quite feel that this view to a certain extent conflicts with the decision of the Court of Queen's Bench in *Railstone v. The York, Newcastle, and Berwick Railway Company*. But it is to be observed that that was not the unanimous decision of the court. My brother COLERIDGE points out many inconveniences which might result from the conclusion to which the majority of the court came. There is no reason why the plaintiff should not have a special jury, under s. 54, to settle the amount of compensation; yet, if the construction contended for by the defendants is the true one, he could not; for, the 54th section would only apply to cases where the proceedings have been commenced under s. 38. It seems to me that it is absolutely necessary, in order to give effect to the intention of the legislature, to put a liberal construction upon the words of the 68th section; and that the plaintiff is entitled to recover his costs.

MAULE, J.—I am of the same opinion. The statute of 8 & 9 Vict. c. 18, is an act which prescribes a number of general regulations which are to apply to all cases to which they are applicable, in respect of railways established by acts to be subsequently passed. As to the procedure, certain general rules are prescribed in general terms. There is a considerable number of sections which apply to the settlement of disputed claims to compensation, by arbitration, or by the assessment of a jury. These rules are framed in general and comprehensive terms: *169] they are not restrained to particular cases, but *are extended to all cases, whether of arbitration or of inquiry before a jury. The 38th section is among these sections. It provides, that, "before the promoters of the undertaking,"—which, according to the interpretation clause, s. 2, is to be understood to mean the parties by the special act ('any act which shall be hereafter passed which shall authorize the taking of lands for the undertaking to which the same relates, and with which this act shall be incorporated') empowered to execute such works or undertaking,—“shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works.” Then the 68th section provides, that, if any party shall be entitled to compensation, and the promoters of the undertaking shall not have

made satisfaction under the provisions of this or the special act, the claimant electing to have a jury to assess the compensation, the promoters shall, upon notice, within twenty-one days, issue their warrant. Now, section 38 clearly comprehends that case: so that I conceive that section 38 applies, even without the aid of the words "in manner herein mentioned" in section 68. The provision in s. 68 is a mere expansion of the expression "all cases" in s. 38. The 68th section applies not only to injuries done to land, but also to claims in respect of the land itself; in which cases the notice mentioned in s. 38 is strictly applicable. It struck me, at one moment, that the notice was not rigorously applicable to s. 68. But that is not so: it is apt and proper for the promoters of the undertaking to give notice where they have taken or *damaged land: they are then put in the same situation as if they had [*170 before taken the land and determined to pay the value. Then, the company was bound to make an offer in this case. The provision as to notice is as expressly applicable to s. 68 as to the case of land in respect of which the company had before given notice of their intention to purchase. If it were necessary to have recourse to the words "in manner herein provided," I think they must be held to import into section 68 all the applicable details contained in the earlier sections; and that, to restrain them in the manner suggested by my brother *Channell*, to such provisions only as it is absolutely necessary to incorporate, would be putting much too narrow and doubtful a construction upon the clause. I think we should treat them as incorporating all that is properly and fairly applicable. This decision may in some degree conflict with that of the Court of Queen's Bench in *Railstone v. The York, Newcastle, and Berwick Railway Company*. But I think the reasons given by my brother COLERIDGE, who differed from the rest of the court, are entitled to great weight. I observe that Lord CAMPBELL says: "Section 38 requires the promoters to give notice to the party, and to state in the notice what sum they are willing to give for 'the lands sought to be purchased by them from such party, and for the damage to be sustained by him.' Section 68 uses different language: it applies where lands 'shall have been taken for, or injuriously affected by, the execution of the works.' Under that state of facts, a different mode is provided by the statute. The party who is put out of possession of his lands may give notice to the promoters of his desire to have the amount of compensation settled by a jury. The party chooses his own time for giving that notice; and the promoters must either pay the amount he claims, or, within twenty-one days after the receipt of such notice, issue their warrant to the *sheriff to summon a jury for [*171 settling the same in the manner herein provided.' No notice is needed; and the act does not require that any should be given. If the consequence of giving this construction to the act, was, to raise a difficulty as to the manner in which the jury was to be summoned, and

*155] *in fee-simple in possession of an estate situate and being in Marshall's Grove, Woolwich, in the county of Kent, and adjoining the south side of the said railway authorized to be constructed, and constructed, by the defendants, under and by virtue of the provisions of the said last-mentioned act, consisting of nine messuages or cottages, with the gardens and yards in the rear thereof, and being No. 1 to No. 9 inclusive in the said Marshall's Grove: That, by reason of the last-mentioned railway having intersected and cut off the roadway adjoining the north side of the said estate of the plaintiff, and having thereby destroyed or obstructed the immediate approaches thereto; and also by the execution of the works by the last-mentioned act authorized to be executed, and by the construction of the said last-mentioned railway, the said estate of the plaintiff was greatly damaged and injuriously affected: That, before the giving of the said notice hereinafter next mentioned, to wit, on the 1st of January, 1849, the defendants took possession of and seized and converted to the purposes of their aforesaid railway, or the works connected therewith, a piece of ground at the North East angle of one of the aforesaid messuages or cottages, by reason whereof the said estate of the plaintiff was further greatly damaged and injuriously affected, and the plaintiff, by reason of the several premises aforesaid, sustained a loss, and claimed to be entitled to compensation in respect thereof from the defendants, to an amount exceeding 50*l.*, to wit, to the amount of 1000*l.*: That, afterwards, the plaintiff being so interested in the said estate, and the same being so injuriously affected as aforesaid, and the plaintiff having sustained such loss as aforesaid, and being entitled to compensation in respect thereof as aforesaid, and being desirous of having the question of compensation settled by a jury, to wit, on the 9th of March, 1850, he the plaintiff

*156] did give a notice in writing *to the defendants, and did thereby and therein state to the defendants the said nature of his interest in the said hereditaments in respect of which he claimed compensation, and that he claimed from the defendants compensation in respect of the said loss and injury, and that 1000*l.* should be paid by the defendants to him the plaintiff for such compensation; and the plaintiff did also by the said notice state to the defendants that it was the desire of him, the plaintiff, that the question of the aforesaid compensation should be settled by a jury in the manner pointed out in that behalf by the lands clauses consolidation act, 1845, unless the defendants should be willing to pay the aforesaid amount of 1000*l.* as compensation, which the plaintiff thereby claimed, and enter, within the time limited by the said statute in that behalf, into an agreement for that purpose: That the defendants afterwards, to wit, on the 20th of March, 1850, gave to the plaintiff a certain notice in writing, whereby, after reciting the said notice so given by the plaintiff to the defendants as aforesaid, they the defendants made known to the plaintiff that they the defendants

were ready and willing, and thereby offered, to pay to the plaintiff the sum of 60*l.* in satisfaction and discharge of the injury and damage alleged to have been sustained by the plaintiff, and in respect of which the said sum of 1000*l.* was so claimed by the plaintiff as aforesaid: That the defendants did not nor would pay the amount of compensation so claimed by the plaintiff as aforesaid, nor did nor would enter into a written agreement for that purpose: That the defendants, within twenty-one days after the receipt of the said first-mentioned notice to them so given as aforesaid, to wit, on the 28th of March, 1850, did, according to the form of the first-mentioned statute, issue their certain warrant in writing, under the common seal of the defendants, and directed to the sheriff of the county of Kent, whereby, *after reciting and referring to the several notices aforesaid, the defendants, pursuant to the powers and authorities given to them [*157 by the statutes in that behalf, required the said sheriff to nominate and summon a special jury to inquire of and assess the compensation, if any, to be paid to the plaintiff in respect of the several supposed matters in his said notice alleged, or any of them, in respect whereof he had therein claimed compensation; and the defendants did by their said warrant further require the said sheriff to issue such summons, and do all such things in relation to the said trial or inquiry, as were authorized and required to be done by the lands clauses consolidation act, 1845, and by the said company's act: That afterwards, to wit, on the 24th of April, 1850, within the said bailiwick of the said sheriff, to wit, at Woolwich, in the county of Kent, a certain inquisition was taken in pursuance of and in accordance and compliance with the last-mentioned request, before Matthew Bell, Esq., then being sheriff of the said county of Kent, by A. B., C. D., &c., twelve honest, lawful, sufficient, and indifferent men of the said county, qualified to serve on juries for trials of issues in Her Majesty's courts of record at Westminster who were duly impannelled, summoned, returned, and drawn pursuant to the provisions of the statute in that behalf, by the said Matthew Bell, at the time of the said request, and then, being sheriff of the said county of Kent as aforesaid, and who were by and before such sheriff, at the time and place last aforesaid, duly sworn to inquire of and concerning the matters in the said warrant in that behalf mentioned, and thereby referred to, to be inquired of, assessed, ascertained, and determined by them, in manner therein mentioned; and the plaintiff and the said defendants, by their counsel respectively, having, at the time and place of the holding of the said inquisition, appeared before the said sheriff and the said jurors, and *having respectively adduced [*158 evidence before the said sheriff and jurors touching the matters so in question as aforesaid, the said jurors, upon their oath did find their verdict that the plaintiff had sustained damages to the amount of 215*l.*, by means of the several matters mentioned in his said notice, and that

the defendants should pay to the plaintiff the said sum of 215*l.*; and the said sheriff did then and there, accordingly, pursuant to the statute in that behalf, give judgment for the said sum of 215*l.* so assessed by the said jury, to be paid by the defendants to the plaintiff according to the provisions of the said statutes; and the said verdict and judgment were then and there, to wit, at the time and place of holding the said inquiry as aforesaid, duly signed by the said sheriff: That, the said verdict and judgment, being so duly signed as aforesaid, were afterwards, and before the commencement of this suit, to wit, on the 1st of May, 1850, duly deposited and left by the said sheriff with the clerk of the peace of the said county of Kent, to be by him kept, and the same are now by him kept, amongst the records of the Quarter Sessions of the said county of Kent, and the said verdict and judgment still remained among the records of the said Quarter Sessions of the said county of Kent, in full force and effect, and in no wise satisfied, reversed, or annulled: That the said sum of 215*l.* for which the verdict of the jury was so given as aforesaid, was and is a greater sum than the said sum of 60*l.* so previously offered by the defendants as aforesaid; by reason whereof the defendants became and were liable to pay to the plaintiff his the plaintiff's costs of the said inquiry: That afterwards, and before the commencement of this suit, to wit, on the 1st of June, 1850, the plaintiff's costs of the said inquiry were settled by Richard Goodrich, then being one of the masters of the Court of Queen's Bench at Westminster, at a certain sum, to wit, the sum of 243*l.* 1*s.* 3*d.*,—of

*159] all which the defendants, *afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice: By reason of which said premises, and by force of the statutes in that behalf, an action had accrued to the plaintiff to demand and have of and from the defendants the said sum of 215*l.*, and also the said sum of 243*l.* 1*s.* 3*d.*, amounting in the whole to the sum of 458*l.* 1*s.* 3*d.*, being the sum above demanded; yet that the defendants had not paid the said sum above demanded, &c.

The defendants pleaded, as to so much of the declaration as related to the said sum of 215*l.*, parcel, &c., payment into court: and, as to the residue of the declaration, demurred generally.

The plaintiff joined in demurrer.

*160] *Channell*, Serjt., in support of the demurrer.(a)—The *plaintiff has proceeded before the sheriff for the value of land taken

(a) The ground of demurrer marked in the margin of the demurrer book, was,—“that the claimant is not by the lands clauses consolidation act, 1845, entitled to costs in any case where a jury has been summoned in compliance with a notice from the claimant, under the 68th section of that act.”

The defendant's “points” were as follows:—

“That the proceedings mentioned in the declaration were proceedings initiated by, and consequent upon, the notice given by the claimant under the 68th section of the lands clauses consolidation act, 1845, and that the inquiry mentioned in the declaration was a proceeding wholly under that section:

by The South Eastern Railway Company, and for damage done to land not taken, under the 68th section of "the lands clauses consolidation act, 1845," 8 & 9 Vict. c. 18. That section enables the claimant to initiate the proceedings, obliging the company, if they omit to issue a warrant to summon a jury within twenty-one days after demand, to pay the amount claimed; the object of the section being, to supersede the old proceeding by *mandamus*. The question intended to be raised here, is, whether this 68th section gives the claimant a right to the costs of the proceeding. It will hardly be contended that that section alone has that effect: but it will be insisted, on the part of the plaintiff, that the 68th section incorporates within it certain prior clauses which give the claimant a right to costs. On the part of the company, it is submitted that this is *casus omissus*, and that the earlier sections, which relate to cases where the proceedings are initiated by the company, are not incorporated in the 68th. That section enacts, "that, if any party shall be entitled to any compensation in respect of any lands, or of any interests therein, which shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated *therewith, and, [*161 if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking, of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided: or, if the party so entitled as aforesaid shall desire to have such question of compensation settled by a jury, it shall be lawful for

"That the said inquiry was not 'such' inquiry as is mentioned in the 51st section of the same statute; which section refers to an inquiry initiated by the company, and where such notice by the company has necessarily been given as is required by the 38th section:

"That, it having been decided that the 38th section does not apply in the case where the notice is given by the claimant under the 68th section, it follows that the 51st section is also inapplicable in such a case, as there is not in such a case any previous offer of compensation by the company with reference to which the costs can be imposed or apportioned, according to the provision of the 51st section:

"That there is no statutory provision relative to the costs of an inquiry under the 68th section'.

"That, although it is alleged in the declaration, that, after the giving of the notice by the claimant under the 68th section, an offer was made by the company, such offer was not an offer made in pursuance of the statute, and, having been wholly unnecessary and superfluous, does not affect the rights or liabilities of either party:

"That it appears that the verdict of the jury was given for a much less sum than the amount of compensation claimed by the claimant in his notice."

mouth for orders. The Hebe sailed again from Constantinople on the 11th of November, 1848. Arrived in the Bristol Channel, she met with bad weather, and the master bore up for Cork, when the vessel was stranded in the Cove, and was obliged to have her main and fore-masts cut away. In this disabled state, she was towed into the harbour at Cove by a steamer called the Sabrina, and a boat belonging to the coast-guard. The cargo was landed at a warehouse at Cove in a very damaged condition, and afterwards carried in lighters to Cork, and sold.

It appeared that about 1700 quarters of the wheat might have been kiln-dried and rendered fit for shipment to Liverpool, its port of destination, at a comparatively small expense,—about 300*l*.

The cargo produced on the sale after deducting the expenses incurred, 3032*l*. 19*s*., and the ship 380*l*. 18*s*. 8*d*.

*178] *The owners of the Sabrina claimed for salvage 3000*l*., and the officer of the coast-guard 1000*l*.

Proceedings were instituted in the Admiralty Court, under whose direction the sale took place; and ultimately that court awarded to the salvors 450*l*., and to the holders of the bottomry-bond 1881*l*., and costs.

In answer to a question from the learned judge, the jury said, that, on the 1st of January, 1849, the plaintiffs might have dried and caused to be conveyed from Cork to Liverpool the 1700 quarters, at a cost less than their value on their arrival at Liverpool. And they further found that a prudent uninsured owner would not have entered into the controversies at Cork, for the purpose of recovering possession of the wheat.

A verdict was thereupon taken for the plaintiffs, with leave for the defendant to move to enter a nonsuit, if the court should be of opinion that the loss was not total.

W. H. Watson, in Easter Term last, obtained a rule nisi to enter a nonsuit or a verdict for the defendant, or for a new trial. He submitted that the evidence disclosed a clear case of partial loss only: and he cited *Thornely v. Hebson*, 2 B. & Ald. 513, and *Navone v. Haddon*, 9 C. B. 30 (E. C. L. R. vol. 67).

Knowles, Crompton, and Blackburn, showed cause.—The vessel, upon being brought into Cork by the salvors, was a perfect wreck, and, by the 9 & 10 Vict. c. 99. s. 19, both ship and cargo were subject to the jurisdiction of the Admiralty Court, till compensation was made to the salvors, or bail given on the part of the owners. The cargo being in this predicament, and in a damaged state, so as to render it impossible to pursue the adventure, that, within all the authorities, amounts to a constructive

*179] *total loss. In *Roux v. Salvador*, 3 N. C. 266, 1 Scott, 1, hides insured from Valparaiso to Bordeaux, free of particular average, unless the ship were stranded, arriving at Rio de Janeiro, on their way

to Bordeaux, in a state of incipient putridity, occasioned by a leak in the ship, were sold for a fourth of their value at Rio, because, by the process of putrefaction, they would have been destroyed before they could have arrived at Bordeaux: the assured received the news of the damage to the hides, and of their sale, at the same time: and it was held that the assured might recover as for a total loss, without abandonment. Lord ABINGER, delivering the opinion of the court of error, in a most luminous judgment, lays down the rule as to partial or total loss, in a manner which has ever since governed these cases. "The existence," he says, "of the goods, or any part of them, *in specie*, is neither a conclusive, nor, in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed, or can have the control of them, if they still have an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of re-shipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But, if the goods, once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel; if it be certain, that, before the termination *of the original voyage, the species itself would disappear, and the goods assume a new form, [*180 losing all their original character: if, though imperishable, *they are in the hands of strangers, not under the control of the assured*; if, by any circumstances over which he has no control, they can never, or within no assignable period, be brought to their original destination: in any of these cases, the circumstance of their existing *in specie* at that forced termination of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation, or from any other insuperable obstacle." [CRESSWELL, J.—Must not the hostile control there spoken of, have arisen out of a peril insured against?] Damaged goods in the hands of salvors, it is submitted, do fall within the rule laid down in that judgment. [JERVIS, C. J.—Suppose the corn not injured at all; but the ship damaged: would the detention of the ship by reason of the bottomry-bond, be a loss of the cargo within this policy?] The original detention here was not the result of the hypothecation. In *Irving v. Manning*, 2 C. B. 784 (E. C. L. R. vol. 52), a policy was effected upon a ship valued at 17,500*l.*, from China to Madras, while there, and back to China: the ship had originally been purchased by the owners for 11,000*l.*, and was, at the time of effecting the policy, together with her

stores, seamen's wages, and other matters not constituting her permanent value, of the value to the plaintiffs of the sum mentioned in the policy: during the voyage, the ship was damaged by perils of the sea, so as to become incompetent to proceed on the voyage, unless repaired at an expense of not less than 10,500*l.*, and, being so repaired, she would be worth a sum not exceeding 9000*l.*, which was her market value at the time of effecting the policy, and immediately before the damage.

*181] *Upon a special verdict finding the above facts, and also finding that a prudent owner, being uninsured, would not have repaired the vessel, and that she was duly abandoned,—it was held, in affirmance of the judgment of the court below, (a) that the underwriters were liable as for a total loss. And this judgment was afterwards affirmed in the House of Lords, (b) where PATTESON, J., in giving the opinion of the judges, says: "The question whether a loss is total or partial, is a question of the same nature as the question what is the extent of a partial loss: and there is the same reason, in both cases, for excluding the consideration of the value in the policy from the inquiry as to the extent of the loss, and for treating that value as binding on the question of how much the subject so totally or partially lost was worth: so that the mode of determining the question whether the loss was total or not, which has been adopted in this case, agrees, in so far as it excludes the consideration of the value in the policy, with that in which the inquiry into the extent of a partial loss on goods is always conducted." In *Holdsworth v. Wise*, 7 B. & C. 794 (E. C. L. R. vol. 14), 1 Man. & R. 673 (E. C. L. R. vol. 17), where a ship, being in a very leaky state, was deserted at sea by her crew, acting *bonâ fide* for the preservation of their lives, and was, on the following day, found and taken possession of by the crew of another vessel, who succeeded in taking her into port, where she was repaired, and afterwards sent to this country, but *subject to claims for salvage and repairs equal to or exceeding her value*,—it was held that the owners, having given notice of abandonment before they received any tidings of the ship's safety, were entitled to recover against the underwriters as for a total loss.

*182] [JERVIS, C. J.—There, there was at the time a total loss.] *So here, there was a total loss: the wheat was out of the control of the assured, who had no means of getting it, but by paying more than it was worth. [CRESSWELL, J.—The underwriter does not insure against a loss by hypothecation.] In *Gernon v. The Royal Exchange Assurance*, 6 Taunt. 383 (E. C. L. R. vol. 1), 2 Marsh. 88 (E. C. L. R. vol. 4), it was held, that, if a cargo be so much damaged that it is not fit to be sent forward to a market, the assured may abandon as a total loss. In *Navone v. Haddon*, 9 Com. B. 30 (E. C. L. R. vol. 67), the facts found were, as the lord chief justice in his judgment observes,

(a) *Manning v. Irving*, 1 C. B. 168 (E. C. L. R. vol. 50).

(b) See *Irving v. Manning*, 1 House of Lords Cases, 287, 6 C. B. 391 (E. C. L. R. vol. 60).

that the silk was only partially damaged, no one package being so injured as in the result to lead to its entire destruction; but the whole might have been forwarded as silk, in a reasonable time, and at a reasonable expense: and it was never out of the control of the assured. Here, however, the wheat was as much lost to the assured as if it had been at the bottom of the sea. [JERVIS, C. J.—Has it ever been pointedly decided that the question of what a prudent uninsured owner would do, applies to the case of goods?] No. On the day on which the Admiralty Court decreed a sale of the ship and cargo, the whole became lost by a peril of the sea, with benefit of salvage: and the assured may recover for loss by salvage, although it be not specifically alleged as a loss in the declaration.^(a) [JERVIS, C. J.—The same consequence would follow, according to your argument, even though the wheat was not damaged at all.] It must undoubtedly go that length. [CRESSWELL, J.—And even though the sale produced the full value?] Not so. [CRESSWELL, J.—Is there such a thing as a loss by sale in the Admiralty Court?] In *Goss v. Withers*, 2 Burr. 683, 2 Ld. Ken. 325, in a case of capture and recapture, the assured on goods was held entitled to recover as for a total loss. In *Reimer v. Ringrose*, 6 Exch. 263,† a cargo of corn was insured “free from average,” [*183 on a voyage from Dantzic to Hull, by the ship *Isabella*. In the course of the voyage, the vessel and cargo sustained damage by the sea, and in consequence the vessel was obliged to put into a port in Norway; and there the corn was taken out for the purpose of drying it, and repairing the vessel, and so enabling her to proceed to England with the corn when dried. The corn, however, when taken out, appeared to have received considerable damage; and the master, after calling in advice, resolved to sell it; and it was accordingly sold (after having been partially dried) as damaged corn, in the Norwegian port. And it was held that the insured could not recover as for a total loss, unless the corn was in such a state in the Norwegian port as that, when brought home, it could not have been sold for an amount exceeding the expense of drying and bringing it home; and that it was not a proper question to leave to the jury, whether a prudent uninsured owner would, under similar circumstances, have sold the corn at the Norwegian port. But, in delivering judgment, ALDERSON, B., says: “On moving this rule, it was suggested, and we all think that the suggestion is well founded, that it would have been a total loss, if the corn had been in such a state in the port of Norway, as that, when brought home, it could not have been sold for an amount exceeding the expense of drying and bringing it home.” At all events, therefore, the proper question has not been submitted to the jury in this case. In estimating whether or not it would be practicable to forward the cargo to its destination, they should take into the account, not only the amounts for which the

(a) 2 Arnould on Insurance, p. 1339, citing *Cary v. King*, Rep. t. Hardw. 304.

ship and cargo were pledged in the Admiralty Court, viz. to the salvors and the holders of the bottomry-bond, but also the cost of unshipping *184] the cargo and transshipping it into a new bottom, the expense of drying and warehousing, and the difference in the cost of transit, if any. If these exceed the value at the port of destination, the loss clearly is a total loss.

W. H. Watson and *Hugh Hill*, in support of the rule.—This was clearly a case of average loss only, for which the underwriters, under the terms of this policy, are not liable. The jury find that 1700 quarters of the wheat might at a moderate expense have been rendered fit to proceed to their destination. The salvage is not to be cast upon the underwriters: *Birkley v. Presgrave*, 1 East, 220. Nor can a partial be turned into a total loss, by expenses incurred in the Admiralty Court. In *Thornely v. Hebson*, 2 B. & Ald. 513, a ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted her on the high seas, for the mere preservation of their lives; and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port: and it was held that such desertion of the crew did not of itself amount to a total loss; and that, the ship having been sold under the decree of the Admiralty Court, to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, they had no right to abandon, and that there was no more than an average loss. The underwriters on goods are not liable for goods necessarily sold to raise money to repair the ship, disabled by a peril of the sea: *Powell v. Gudgeon*, 5 M. & Selw. 431; *Sarquy v. Hobson*, 2 B. & C. 7 (E. C. L. R. vol. 9), 3 D. & R. 192 (E. C. L. R. vol. 16); (a) *Benson v. Chapman*, 2 House of Lords Cases, 696. [WILLIAMS, J.—That is not disputed.] The master is *185] bound to carry goods to their destination, so long as they are capable of being carried, or may be made so at a reasonable amount of labour and expense: *Shipton v. Thornton*, 9 Ad. & E. 314 (E. C. L. R. vol. 36), 1 P. & D. 216; *Vlierboom v. Chapman*, 13 M. & W. 230.† Here, at all events, the 1700 quarters might and ought to have been forwarded, and then the master would have performed his contract, and earned freight. *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court:—

The question in this case was, whether the loss was partial or total. If total, the verdict for the plaintiffs must stand: if partial, the defendant will be entitled to succeed, provided he has paid into court an amount sufficient to cover the average loss, and the learned judge has properly left to the jury the questions upon which the distinction between a total and a partial loss depends.

Upon consideration, we are of opinion, that the loss cannot, as it now

(a) And see *Sarquy v. Hobson*, 12 J. B. Moore, 474 (E. C. L. R. vol. 22), 4 Bingh. 131 (E. C. L. R. vol. 13, 15), 1 Y. & J. 347.†

appears upon the evidence, be considered to be total,—that the evidence shows it to be partial only: but, inasmuch as the true test between a total and a partial loss was not, in our opinion, submitted to the jury, there can only be a new trial.

The facts of the case are in some respects complicated; but the application of a few well-known principles will clear it of all difficulty, without entering into a minute examination of the various authorities which range within the general principles referred to.

The subject-matter of the insurance, is, a cargo of wheat, shipped in bulk, and insured in bulk, and upon *which, therefore, the loss is an average upon the whole, and not total on part, if a part of [*186 such cargo be wholly destroyed by perils of the sea: *Hills v. The London Assurance Company*, 5 M. & W. 569.† Being a perishable cargo, and thus conditioned, it arrived in Cork greatly injured by perils of the sea. Without reference to the proceedings in the Court of Admiralty, or to the salvage, or to the hypothecation, the duty of the master was, under such circumstances, clearly defined.

As a general rule, where the whole or any part of a cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. Whether the cargo can practically be forwarded to its port of destination, involves a consideration of all the circumstances of each particular case: and this word “practically,” as explained by my brother MAULE, in *Moss v. Smith*, 9 C. B. 94 (E. C. L. R. vol. 67), comprehends the condition upon which the difference between a total and partial loss depends. “In matters of business,” says that learned judge, “a thing is commonly treated as ‘impossible,’ when it is impracticable, and as ‘impracticable,’ when it cannot be done without laying out more money than the thing is worth.” Thus, if goods are reduced to such a state, by sea-damage, as to be worth nothing if sent on, the master may sell them, and the owner may recover as for a constructive total loss: *Parry v. Aberdeen*, 9 B. & C. 411 (E. C. L. R. vol. 17). So, if, from sea-damage, the goods cease to retain their original character, for instance, from the progress of putrefaction, the master is justified in selling, and the assured may recover a total loss: *Roux v. Salvador*, 3 N. C. 266, 4 M. & R. 343, 4 Scott, 1. On the other hand, if the damage is reparable, the loss is total *or partial, according [*187 to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible. If it can, the cargo is then practically capable of being sent in a marketable state to its port of destination, the master cannot sell it, and the assured cannot recover as for a constructive total loss. And the same rule applies, if a part only of the cargo can be saved.

With respect to the means of conveyance, the master is bound by his contract to carry the goods to their destination in his own ship. If that ship is disabled in the course of the voyage, and cannot be repaired at all, or cannot be repaired in time to save a perishable cargo, he is empowered, if not bound, to send the cargo on in another bottom, provided it can be obtained.

It is not necessary to go at greater length into this subject. But, applying these few general principles to this case, if there had been no proceedings in the Admiralty Court, when the cargo arrived in Cork it would have been the duty of the master to ascertain whether the cost of unloading the cargo from the original ship, of drying and restoring it, and of transhipping it upon a new bottom, the original ship not being reparable, would, in the aggregate, exceed the value of the restored cargo at its place of destination. If it would, then it would not have been practicable to deliver the cargo in a marketable state at its port of destination. If it would not, then the master could not sell, and the assured could not recover as for a constructive total loss; because it was practicable to deliver the cargo, or part of it, in a marketable state at the port of discharge.

It was said in the course of the argument, that the cost of carriage from Cork to Liverpool ought also to be taken into consideration, with a view to ascertain if the expense of restoring would exceed the value of the *thing restored: and the case of *Reimer v. Ringrose*,—
 *188] a case lately determined in the Exchequer; the judgment having been delivered by ALDERSON, B., on the 26th of February, 1851,(a)—was cited for that proposition. The point was not made in that case; but, the question being, whether a cargo of wheat was totally or partially lost, the learned baron is reported, in the note furnished to us, to have said: “One point made at nisi prius, was, whether or not it was a total loss, in case any party uninsured would have conducted himself, as a reasonable man, in the way in which the plaintiff had conducted himself,—that is, instead of bringing home the cargo in a damaged state, and putting himself to expense in so doing, selling it, and receiving the money. Now, I at that time was of opinion, and am so still, and I believe the court entirely concur with me, that that was not a proper view of the case to be left to the jury at all; but that the real question to be left to the jury ought to have been, whether or not the corn was in that state, that, if brought home, it could have been sold for an amount exceeding the expense of bringing it home.”

With great deference, we think this is not the correct rule. If the voyage is completed in the original ship, it is completed upon the original contract, and no additional freight is incurred. If the master tranships because the original ship is irreparably damaged, without considering whether he is *bound* to tranship, or merely *at liberty* to do

(a) Since reported, 6 Exch. 263.†

so, it is clear that he tranships to earn his full freight; and so the delivery takes place upon the original contract. It may happen that a new bottom can only be obtained at a freight higher than the original rate of freight. It does not seem to have been settled, whether, in that case, the shipowner may charge the cargo with the additional freight. By the French *law, he *may* do so: and, as a consequence of that rule, the increased freight would be an average [*189 loss, to be added to the other items: see *Shipton v. Thornton*, 9 Ad. & E. 314 (E. C. L. R. vol. 36), 1 P. & D. 216. In our opinion, to this extent, and to this extent only, the cost of transit from Cork to Liverpool should be taken into consideration, in ascertaining the practicability of delivering the cargo, or part of it, in a marketable state, at the port of discharge.

In what respect, then, do the hypothecation, the salvage, and the proceedings in the Admiralty Court, affect this case?

There is no doubt that the cargo is liable for salvage service; and it is equally clear that underwriters who would have borne the loss, had there been no such service, must contribute to that salvage. Whilst the rule prevails, of giving no more than half the value of the property saved, a loss by salvage can only be an average loss; and, as the amount of salvage depends upon the value of the article saved, it cannot alter the nature of the loss, whether it be uninjured or in part deteriorated by sea-damage. Being an average loss, however, the amount must be added to the other items, with a view to ascertain whether it is practicable to deliver the cargo, or part of it, at the port of destination, in a marketable state.

It was admitted, in the course of the argument, that the mere fact of hypothecation would not, by the necessary proceedings which would follow upon that act, make a total loss of the goods pledged, within the meaning of the policy: but it was said, that, under the circumstances of this case, it ought to form an item of calculation, in estimating the cost of restoring the cargo. We see no reason for this distinction. The fact of a portion of the cargo having been injured, can make no difference. *Nor can the case be varied by the circumstance [*190 that the Admiralty Court has a jurisdiction over the ship and cargo, in respect of the salvage,—a subject totally unconnected with the hypothecation.

With respect to the proceedings in the Admiralty Court, it is the well-known duty of the master, in order to save the expense of further proceedings, to tender, in the first stage of the cause, by act of court, a specific sum for salvage, with an offer to pay the costs. If he does not do so, and, refusing to give bail, the cargo is sold by decree of the court, this is not a total loss for which the underwriters will be liable. It is a risk not contemplated by the policy, and which the assured must take upon himself.

It remains only to apply these general principles to the case under discussion. The jury having found that 1700 quarters could have been dried, and conveyed from Cork to Liverpool, at a cost less than their value on their arrival at Liverpool, it is plain that the verdict cannot stand, for a total loss. It is plain also, from the form of the finding, that the jury took into their consideration only the cost of drying and of transit to Liverpool, as the basis of their calculation. We think this was not the true test. There must, therefore, be a new trial.

The question to be submitted to the jury will be,—was it practicable to send the whole or any part of the cargo to its place of destination, Liverpool, in a marketable state? To determine this question, the jury must ascertain the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of transhipping it into a new bottom, and the cost of the difference of transit, if it can only be effected at a higher than the original rate of freight. Add to these items, the salvage allowed, in proportion to the value of the cargo saved,—and the loss will be total, if the aggregate exceed the value of the cargo when *191] delivered at Liverpool, the port *of discharge. But, if the aggregate do not so exceed the value of the cargo, or of that part of it saved, the loss will be partial only.

This view of the case renders it unnecessary to discuss the other points which were raised upon the argument.

The rule will be absolute for a new trial.

Rule absolute accordingly.

A partial loss of an entire cargo by sea-damage, if amounting to more than fifty per cent., may be converted into a technical total loss; but not if a distinct part of the cargo be destroyed, and the voyage be not thereby broken up or rendered unworthy of being prosecuted: *Seton v. Delaware Insurance Co.*, 2 Wash. C. C. Rep. 175. It is a total loss, where, by reason of the peril insured against, the cargo is permanently prevented from arriving

at the port of destination: *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 220. If the cargo can be brought to its place of destination without a loss exceeding fifty per cent., the captain should have it brought, and not break up the voyage by a sale: *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131; *Pope v. Nickerson*, 3 Story, 465; *Myers v. Baymore*, 10 Barr, 114.

BELSHAW v. MARY ANN BUSH.

To debt on simple contract for goods sold and delivered, work and labour, &c., the defendant pleaded "as to 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof," that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the plaintiff drew a bill on C. for 33*l.* 10*s.*, payable to the plaintiff's order three months after date; that C. accepted the bill, and delivered it to the plaintiff, and the plaintiff received it, for and on account of the said sum of 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof; and that the plaintiff endorsed and delivered the bill to one D., who was, before and at the time of the commencement of the suit, the holder of the bill, and entitled to sue C. thereon:—

Held, that the giving of the bill by C. must be taken to be a conditional payment on behalf of the defendant; that the condition to defeat it not having happened, it operated as an absolute payment; and that it might be, and had been, adopted by the defendant in his plea, and consequently that it barred the action.

DEBT for 40*l.* for goods sold and delivered, 40*l.* for work and materials, 40*l.* for money paid, and 40*l.* for money found due upon an account stated.

Pleas,—first, never indebted,—secondly, “as to the sum of 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof, the defendant says, that heretofore, and after the accruing of the causes of action in the said declaration mentioned, and before the commencement of this suit, to wit, on the 30th of October, 1849, the plaintiff made his bill of exchange in writing, and directed it to one William Bush, the father of the defendant, and thereby required the said William Bush to pay to the order of the plaintiff 33*l.* 10*s.* for value received, three months after the date *thereof; and the said William Bush then accepted the said bill, and then delivered [*192 the same so accepted to the plaintiff, *for and on account of the said sum of 33*l.* 10*s.* parcel of the said debt in the said declaration mentioned, and the causes of action in respect thereof*; and the plaintiff then received and took the said bill of and from the said William Bush for and on such account as aforesaid: And the defendant further says, that, afterwards, to wit, on the day and year aforesaid, *the plaintiff endorsed and delivered the said bill to a certain person, to wit, to one William Patrick Gray, who then became, and was before and at the time of the commencement of the suit, the holder of the said bill, and entitled to sue the said William Bush thereon,*”—verification.

The plaintiff joined issue on the first plea, and replied to the second, *that the said bill of exchange in that plea mentioned had become and was overdue and unpaid before the commencement of this suit, to wit, on the 3d of February, 1850, and that no part of the said money therein mentioned hath ever been paid,*—verification.

The defendant demurred generally to the replication to the second plea,—the following point being marked in the margin of the demurrer: —“One matter of law intended to be argued is, that the replication to the last plea is bad in substance, on the ground that it is admitted thereby that the bill of exchange taken by the plaintiff on account of the debt, has been endorsed by him for value to a third person, in whose hands it is now outstanding.”

Quain, in support of the demurrer.—The plea is good, and the replication affords no answer to it. There are many cases to show that a plea of a bill or note given “for and on account” of a debt, is bad, unless it go on to show that it was accepted in satisfaction, or that it is outstanding in the hands of an endorsee: *Mercer v. *Cheese*, [*193 4 M. & G. 804 (E. C. L. R. vol. 43) 5 Scott, N. R. 664; Mail-

lard v. The Duke of Argyll, 6 M. & G. 40 (E. C. L. R. vol. 46), 6 Scott, N. R. 938, 1 D. & L. 536; Price v. Price, 16 M. & W. 232.† The nature of such a plea is well explained in the note to Holdipp v. Otway, 2 Wms. Saund. 103 b, n. (c): "It has been established by modern authorities, that the acceptance of a negotiable note or bill 'for and on account' of a debt, must be taken *prima facie* to be in satisfaction of that debt, until it appears that the note or bill remains unpaid in the possession of the creditor, without any laches by him: Kearslake v. Morgan, 5 T. R. 513; (a) Burden v. Halton, 4 Bingh. 454 (E. C. L. R. vol. 13, 15), 1 M. & P. 223 (E. C. L. R. vol. 17); Kendrick v. Lomax, 2 C. & J. 405;† Mercer v. Cheese. It is usually said that the taking of the note or bill *suspends* the creditor's remedy for the time it has to run, for that it amounts to an agreement by him not to sue for that time, in consideration of the debtor giving the note or bill: see Simon v. Lloyd, 2 C. M. & R. 187, 189,† 3 Dowl. P. C. 813. It may be observed, however, that, where the obligee of a bond even expressly covenants not to sue for a certain time, this cannot be pleaded in bar to the action on the bond, but is a covenant only, for a breach of which the obligor may bring his action: Ayloffe v. Scrimshire, Carth. 63, 1 Show. 46, Comb. 123, 124, 2 Salk. 573. And the reason seems to be, that, if such covenant were allowed to operate in suspension of the action, the right of action would be altogether lost, inasmuch as it is a rule, that, where a personal action is once suspended by the voluntary act of the party, it is for ever gone and discharged: Fryer v. Gildridge, Hobart, 10; Dorchester v. Webb, Cro. Car. 373; per POWELL, J., in Wankford v. Wankford, 1 Salk. 302, 303. In truth, *then, this

*194] abeyance of the creditor's right to sue seems an anomaly which the law has admitted, as in other instances, as part of the law-merchant, in respect of mercantile securities." The question is, how far this doctrine is applicable to a bill or note given by a third person. If this had been the case of a bill accepted by the defendant, or by one jointly with the defendant, the plea would unquestionably have been good. Here, it will be necessary to carry the doctrine a step further. A plea of accord and satisfaction by a *stranger* would, it is conceived, be good: this appears from the authorities collected in the judgment in Jones v. Broadhurst, 9 C. B. 173 (E. C. L. R. vol. 67), and particularly from the passage there cited from Fitzherbert's Abridgment, title *Barre*, pl. 166, where it is said, that, "If a stranger does trespass to me; and one of his relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*" The Roman law, Just. Inst. book III. tit. XXX., is to the same effect. The same point is laid down in the Code Civil, Liv. III., Tit. III., Sect. I., art. 1236. This plea, which, accord-

(a) Upon the authority of an unreported case of Richardson v. Rickman.

ing to PARKE, B., in *Ford v. Beech*, 11 Q. B. 854 (E. C. L. R. vol. 63), amounts to conditional payment or satisfaction, is equally good. If actual payment by a stranger is good, there can be no reason why conditional payment by a stranger should not be. [WILLIAMS, J., referred to *Southall v. Rigg* and *Forman v. Wright*, 20 Law Journ., N. S., C. P. 145.] Suppose this not to amount to conditional payment, but only to an agreement to suspend the remedy during the currency of the bill; if a stranger may satisfy the debt altogether, it follows that he may suspend it for a time, by giving an instrument like this. A man accepting a bill for the debt of another, could not plead want of *consideration: the suspension of the remedy would be the con- [*195 sideration. In *Crofts v. Beale*, antè, p. 172, the note was payable *on demand*. In *Baker v. Walker*, 14 M. & W. 465,† to an action against the maker of a promissory note payable three months after date, the defendant pleaded, that the promissory note was made and delivered by him to the plaintiff for and on account of a judgment debt recovered by the plaintiff against him, and that, except as aforesaid, there never was any consideration or value for the making or delivery of the said note to the plaintiff: and it was held that the plea was bad, inasmuch as it showed there was an existing debt on account of which the note was made, and the giving of the note was evidence of an agreement by the plaintiff to suspend his remedy upon the judgment, which was a sufficient consideration for the note. But PARKE, B., in the course of the argument, observes: "A promissory note given for the debt of a third person suspends the right of action, although no new consideration be given:" and he refers to *Lechmere v. Fletcher*, 1 C. & M. 623.† And, in giving judgment, he says: "I am of opinion that the plea is bad, for, it shows there was a debt in existence on account of which the note was made, and that is sufficient to make the note good. It is like the case of a note given for a debt of a third party, which has been held to be a sufficient consideration. It was so held in *Poplewell v. Wilson*, 1 Stra. 264, and that principle has been acted upon in many other cases." So, in *Chitty and Hulme on Bills*, 9th edit. p. 73, it is said: "The debt of a *third* person, or forbearance to his representative, is an adequate consideration:" for which are cited the cases of *Poplewell v. Wilson*, and *Ridout v. Bristow*, 1 C. & J. 281,† 1 Tyrwh. 84. The like is stated, on the same authority, *in *Byles on Bills*, 6th edit. p. 96. In *Walton* [*196 *v. Mascall*, 13 M. & W. 452,† it was held, that, where a party guaranties the payment of a promissory note, if it be not "*duly honoured and paid*" by the maker according to its tenor and effect, he is liable on his guarantee, if the note be not paid by the maker when due, without any *presentment* to him for that purpose. The cases as to composition deeds, which bear some analogy to this question, will be found commented on in the notes to *Cumber v. Wane*, 1 Smith's Leading Cases,

The replication that the bill was over due and unpaid, is no answer to the plea, the bill being in the hands of a third person, to whom, in the absence of anything to show the contrary, it must be assumed to have been endorsed for value.

Bovill, contrà.—The plaintiff has a clear cause of action, and nothing has been shown to have happened to defeat, destroy, or suspend his remedy. So far as the defendant is concerned, it is clear that he has done nothing, nor requested any third person to do anything on his account or for his benefit. Where the defendant gives his own acceptance in satisfaction of a debt, the giving a negotiable security amounts to a consideration; and it amounts to an agreement that the remedy for the original debt shall be suspended during the currency of the bill. *Swinyard v. Bowes*, 5 M. & Selw. 62, and *Van Wart v. Woolley*, 3 B. & C. 439 (E. C. L. R. vol. 10), 5 D. & R. 374 (E. C. L. R. vol. 16), show that the bill of a stranger differs in many respects from that of the party himself. When the earlier cases upon this subject arose, it was considered that the giving of a bill operated a suspension of the remedy. Thus, in *Stedman v. Gooch*, 1 Esp. N. P. C. 3, Lord KENYON states it *197] to be clear law, “that, if in payment of a debt *the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt, until such bill or note becomes payable, or default is made in the payment.” That is perfectly intelligible. [MAULE, J.—That negative ruling does not go quite far enough for your purpose.] In *Kearslake v. Morgan*, 5 T. R. 513, and that class of cases, down to *Price v. Price*, 16 M. & W. 232,† it seems to have been held that the giving of a bill by *the defendant* operates as an agreement not to sue pending the currency of the bill, or while it may remain outstanding in the hands of an endorsee for value. This is an attempt to extend that doctrine one step further. *Simon v. Lloyd*, 2 C. M. & R. 187, was the case of an agreement between the immediate parties, to suspend the remedy for a time. [JERVIS, C. J.—The real answer is, that, upon this record, you have been paid your debt.] Not by the defendant. [MAULE, J.—Suppose the plaintiff had covenanted with the defendant’s father, for a good consideration, that he would not sue the defendant for a given time; no doubt, according to *Gibbons v. Vouillon*, 8 C. B. 483 (E. C. L. R. vol. 65), that, if the covenant had been with the defendant herself, would have operated as a release; otherwise it could not.] Clearly not. [MAULE, J.—There is no substantial difference between that case and this—at least, none that is favourable to the defendant. But the question is, whether the doctrine which the authorities show to be sufficiently established with regard to bills of exchange, is to be extended to an agreement with a third party, so as to make it incumbent on us to apply it to this case.] All the authorities are cited and so fully commented on in *Jones v. Broadhurst*, 9 C. B. 173 (E. C. L. R. vol. 67), that it would be idle to repeat them. As to

the case of composition deeds, it may be observed that there the defendant is always a party to the deed. If the plea *in the present case had simply stated that William Bush gave the bill in question to the plaintiff, that might have imported consideration: but the plea goes on to show circumstances which exclude William Bush's liability on the bill. [*198]

Quain, in reply.—The same construction must be put upon this plea, whether the defendant or a third person is the acceptor of the bill. The lord chief justice has asked what is the nature of the contract, and how long the forbearance. The nature of the contract is sufficiently explained in *Price v. Price*; and the forbearance is to be during the currency of the bill, or, if it be endorsed over, until the plaintiff has retired it from the holder. The case of a covenant not to sue for a limited time, is an excepted case,—adopted to avoid circuitry of action; *Gibbons v. Vouillon*. But for the rule established in *Ford v. Beech*, 11 Q. B. 842, 852 (E. C. L. R. vol. 63), it is difficult to understand why a man should not covenant to suspend a remedy. [MAULE, J.—It would be very inconvenient to carry out that principle. There is authority for the case of a suspension of the remedy by the acceptance of a bill of exchange. But here there is this further difficulty: you are in the situation of a person saying to another, you shall not sue me, because you have entered into an agreement with a third party, for a valuable consideration, that you will not do so. That is not pleadable.] The doctrine of *Ford v. Beech* is not, it is submitted, to be extended. [JERVIS, C. J.—The question is, whether the anomaly is to be extended.] The good sense of the matter is with the exception. If a stranger may *pay* the debt, why may he not do it in the lesser degree by giving a bill of exchange? [MAULE, J.—No doubt the agreement is good. The *question is whether you can avail yourself of it by pleading it.] [*199] *Cur. adv. vult.*

MAULE, J., now delivered the judgment of the court.

In this case, it is first to be considered what is the true meaning of the plea, and secondly, whether it be an answer to the claim to which it is pleaded.

The declaration is in debt on simple contract, for goods sold and delivered, &c. The plea is pleaded to the demand for “33*l.* 10*s.*, parcel of the debt in the declaration, and the causes of action in respect thereof,” and it states, that, after the accruing of the causes of action in the declaration mentioned, and before the suit, the plaintiff drew a bill on William Bush, for 33*l.* 10*s.*, for value received, payable to the plaintiff's order three months after date, which William Bush accepted, and delivered the same so accepted to the plaintiff for and on account of the said sum of 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof, and the plaintiff then took and received the said bill from the said William Bush for

and on such account as aforesaid, and that the plaintiff afterwards endorsed the bill to one William Patrick Gray, who was the holder, and entitled to sue Bush thereon, at the commencement of the suit.

We think that "33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof," on account of which the plea alleges the bill to have been delivered and received, must be understood to mean the 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action *in the declaration mentioned*, in respect thereof, that is, the causes of action *of the plaintiff against the defendant*.

The declaration shows debts and goods sold and delivered, &c., by the plaintiff to the defendant: and it is *not to be presumed
*200] that there were any other causes of action in respect of such debts, than those of the creditor against the debtor. In this respect the plea differs from that in *Jones v. Broadhurst*, where the action was by the endorsees against the acceptor of a bill of exchange, and the plea stated that the drawers delivered to the plaintiffs, and the plaintiffs accepted, divers goods, in full satisfaction and discharge *of the bill of exchange*, and of all damages and causes of action in respect thereof; and the court held that the drawers, being parties to the bill, and consequently liable to pay it, the satisfaction and discharge mentioned in the plea must be understood to apply to the liability as drawers of those who delivered the goods, and not to that of the defendant as acceptor. In the present case, no liability of any one but the defendant, and no cause of action but those of the declaration, appears. We think, therefore, that this plea is to be understood as meaning that William Bush gave, and the plaintiff took, the bill on account of the defendant's liability to pay the causes of action which the plaintiff had against the defendant in respect thereof.

Understanding the plea in that sense, the next question is, whether it be a good answer to the action.

It cannot be questioned that it has been established by many decisions, that, if the plea had alleged the bill to have been delivered to the plaintiff by the defendant, instead of by William Bush, and had, in all other respects, been such as it now is, it would have been an answer to the action: but, as no case has been found in all respects resembling the present, it is contended that those decisions will not govern this case, by reason of this difference; and the rather as those decisions have sometimes been considered as anomalous and contrary to established rules
*201] of law; that the ground of *those decisions, is, that the giving a bill on account suspends the right of action for the original debt; and that this is contrary to the rule that a personal action once suspended by the act of the party, is gone for ever, and also to the rule that a covenant not to sue for a limited time, is no bar to an action.

It will, therefore, be convenient to consider these rules of law, and the decisions which are said to conflict with them.

The rule as to a personal action once suspended, being gone, is referred to by POWELL, J., in the terms above mentioned, in *Wankford v. Wankford*, 1 Salk. 299, in the 10th of William 3, where it is applied to the case of an obligee making the obligor his executor; which was held to extinguish the debt, so that an administratrix *de bonis non* could not sue the heir of the obligor: and the rule is, undoubtedly, of much greater antiquity, and has also been acted on in recent times,—as in *Freakly v. Fox*, 9 B. & C. 130 (E. C. L. R. vol. 17), and *Harmer v. Steele*, 4 Exch. 1.† But it is not, and never was, true, that, in no mode, and under no circumstances, can a personal action be suspended; for, though a simple covenant or agreement not to sue for a limited time be not a bar to an action, it is not inoperative, and so far suspends the right to sue, that it prevents its exercise, without subjecting the plaintiff to an action at the suit of the defendant for a breach of the covenant or agreement. But there is a more important exception, which is probably as old as the rule itself, which is adverted to by HOLT, C. J., and DOLBEN, J., in *Comberbach*, p. 124, where they are reported as saying “that the rule, that a personal action once suspended, is for ever extinct, does not hold in all cases.” In this report, the exception is not specifically mentioned; but, in the report of the same case, in *Carthew*, p. 63, under *the name of *Ayloff v. Skrimpshire*, it is said “that it was agreed by all that a letter of license containing [*202 the words following, viz., that if the creditor sue, &c., within such a time, that his debt shall be forfeited, such license is pleadable in bar:” and this is plainly the exception to the rule that is adverted to by HOLT, C. J., and DOLBEN, J., as reported in *Comberbach*. In *Gibbons v. Vouillon*, 8 C. B. 483 (E. C. L. R. vol. 65), this law was considered and acted on; and it appears from the authorities cited that there have been decisions to the like effect from the 21 H. 7.

It is said by the reporter in *Fowell v. Forrest*, 2 Saund. 48, that a defeasance is a conditional release: and clauses, that the debt shall be forfeited, or that the deed may be pleaded in bar, if a suit be commenced before a certain time, or a certain event, are of common occurrence, and, as the cases cited show, have due effect given to them. In all these cases, the right of action is effectually suspended for the time, or till the condition is performed; and, after the expiration of the time, &c., the action may be maintained, if the plaintiff, by bringing another action before the time, have not forfeited his debt under the provisions of the defeasance, or have not been barred in a former action.

There are, however, some modern cases which have sometimes been considered as infringing on the rule that an agreement not to sue for a limited time, without such clause of conditional release, or forfeiture, is no answer to an action for a cause accrued after the agreement, but

only a ground for a cross-action, and giving to such an agreement the effect of a bar to an action brought before the expiration of the time. Of these, one of the principal is, *Stracey v. The Bank of England*, 6 Bingh. 754 (E. C. L. R. vol. 19), 4 M. & P. 639, where the language *203] of the court, in giving *judgment, if looked at without reference to the facts of the case, may seem to give countenance to the notion that an agreement not to sue during a limited time, without any clause of conditional release, or forfeiture, is a bar to an action brought during the limited time. But, if the facts of that case be adverted to, the language of the judgment will appear not to have such meaning. It was an action on the case by the plaintiffs against The Bank of England, for not transferring some stock of theirs, standing in their books, to one Alder, to whom the plaintiffs had sold it, and had called on the defendants to transfer it to him. The special verdict showed a binding agreement between the plaintiffs and the defendants, that the plaintiffs should not call on the defendants to transfer the stock until the plaintiffs had proved, or endeavoured to prove, a debt against the estate of certain bankrupts. After the agreement, and before proof of, or attempt to prove, the debt, the plaintiffs called on the Bank to transfer to Alder; and it was for not complying with that demand that the action was brought. The court were of opinion that, after this agreement, the plaintiffs had no right to call on the Bank to transfer, before proving, or attempting to prove, the debt, and consequently that the defendants, in refusing to transfer on the occasion complained of, had done no wrong. It is clear, that the right of action declared on had never accrued; and that no action for the refusal complained of in the declaration could be at any time maintained, the duty of which that refusal was complained of as a breach, not existing at the time of the refusal. The language of the court in giving judgment is: "The agreement is not set up as a perpetual bar; it is merely insisted on as an objection to the action being brought at the present time. It is urged as an agreement by which the plaintiffs have, for a good consideration, re- *204] strained themselves from suing, not *perpetually, but only until they shall have first done a particular act." If this be understood as meaning that the agreement is not set up as a perpetual bar to any action that the plaintiffs may at any time bring respecting any refusal to transfer, but only to an action for a refusal after the agreement, and before proof or attempt to prove,—which action is barred by showing that the right to it does not exist; and, if the "restraint from suing, not perpetually, but only until they shall have first done a particular act," be understood as meaning a restraint from calling for a transfer, and suing for a refusal to transfer, the reasons given for the judgment will be applicable to the case, and will conflict with no rule of law; which they certainly would, if understood as affirming that an action may be barred by a mere agreement or covenant not to

sue for a limited time. The expressions in question seem, indeed, to have been used by the court only for the purpose of showing that the plaintiffs, though defeated in that action, would not lose their right to the stock, but might claim a transfer after performing what they had agreed to do before claiming it. See the judgment of the Exchequer Chamber in *Ford v. Beech*, 11 Q. B. 852 (E. C. L. R. vol. 63), and other cases, in which a suspension of the remedy has been spoken of, and which may, it is conceived, be explained in a like manner, so as to show them to be not inconsistent with the older decisions.

The cases of covenants not to sue for a limited time, with a proviso for forfeiture if an action be brought within the time, are an exception or qualification of the rule that a covenant not to sue for a limited time is no bar, as well as to the rule as to suspension of rights of action. In such cases, the right to sue is effectually suspended for a limited time, and for such time only, if *no action be brought before the expi- [*205 ration of the time; and the covenant not to sue for a limited time does operate as a bar, by force of the condition, if the action be brought within the limited time. It would, indeed, be anomalous, and without precedent, if it were held, that, after a cause of action had accrued, and an action upon it had been barred by force of a release or defeasance conditional on its being sued upon before a limited time, another action could be maintained for the same cause after the time. But there is no such decision; and the contrary was determined by this court in a late case of *Overton v. Harvey*, 9 C. B. 324 (E. C. L. R. vol. 67), and is assumed in numerous books, in which it is given as a reason why a mere covenant not to sue for a given time is no bar, that, if it were, the debt would be gone for ever, contrary to the intent of the parties.

Now, the cases in which a bill given on account of a debt, has been said to suspend the right of action, and been held to be a bar to an action brought before the bill had turned out to be unproductive, are entirely in conformity with the cases establishing the exceptions above referred to. The true principle of the cases on bills seems to be that pointed out by POLLOCK, C. B., in *Griffiths v. Owen*, 13 M. & W. 58, 64,†—"In the case of a money demand, if the creditor accepts a promissory note, or an order for the payment of money, on account of the debt, that is a sort of qualified or conditional payment, and may be so pleaded," and by ALDERSON, B., in *Jamés v. Williams*, 13 M. & W. 828, 833:† "Where bills of exchange have been stated to have been delivered for and on account of a promissory note, or any other sum in the declaration mentioned, there it is to be taken as a conditional payment, and may be so pleaded."

*If an agreement were expressly made, that the bill should [*206 operate as payment, unless defeated by dishonour, &c., there is no reason why a suit brought while the payment remained undefeated,

should not be barred by such agreement: and the cases in which a bill given on account of the debt has been held to operate as such payment, are to be supported by considering that such an agreement is to be implied by law from giving and receiving such security on account of a debt on simple contract: and the cases in which the giving of the bill has been held not to suspend the remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an assent that the bill shall operate as a conditional payment, does not arise, when, if it did, the plaintiff would be deprived of a better remedy than an action on a bill, as in *Davis v. Gyde*, 2 Ad. & E. 623 (E. C. L. R. vol. 29), in which, the debt being for rent, the plaintiff would part with a remedy by distress: and as in *Worthington v. Wigley*, 3 New Cases, 454, 4 Scott, 558, where, the demand being on a bond, the plaintiff might, in certain events, have recourse to other funds than he could in an action on a simple contract.

If a bill given by the *defendant* himself on account of the debt operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a stranger for and on account of the debt should not operate as a conditional payment by the stranger; and, if it have that operation, the plea in the present case will have the same effect as if it had alleged that *the money* was paid by William Bush for and on account of the debt. But, if a stranger give money in payment, absolute or *con-
 *207] ditional, of the debt of another, and the causes of action in respect of it, it must be a payment on behalf of that other, against whom alone the causes of action exist, and, if adopted by him, will operate as payment by himself: see Co. Litt. 206.b,—“If a stranger, in the name of the mortgagor or his heir (without his consent or privity), tender the money, and the mortgagee accepteth it, this is a good satisfaction.” See also the case of 36 H. 6, reported in Fitzherbert's Abridgment, title *Barre*, pl. 166: “If a stranger does trespass to me, and one of his relations, or any other, give anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*”

In the late case of *Jones v. Broadhurst*, 9 C. B. 173, in this court, the question of satisfaction by a stranger was argued and considered, but not decided, not being necessary to the determination of the case: but it is observed by the court, in giving judgment, that the decision in the 36 H. 6, reported in Fitzherbert, is consistent with reason and justice.

It appears to us, therefore, that the bill given by William Bush on account of the causes of action of the plaintiff against the defendant, must be taken to be a conditional payment on behalf of the defendant,

that the condition to defeat it not having happened, it operates as an absolute payment; that it might be adopted, and has been adopted by the defendant, who relies on it in his plea; and, consequently, that it bars the action.

Judgment for the defendant.

The payment of a debt by one not a party to the contract is an extinguishment of the debt, whether made with the assent of the debtor or not: *Harrison v. Hicks*, 1 Porter, 423.

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***HARRISON ROBINSON and JANE MARY his Wife v. The MARQUIS OF BRISTOL and Others. June 9. [*208**

A count in *quare impedit* stated that one A. was seised in fee of a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, and was entitled to present to the same every alternate turn, the other moiety of the advowson belonging to B.; that A., in his turn, being so seised, presented C., who was on such presentation admitted, instituted, and inducted; that afterwards the church became vacant by the resignation of C., whereupon B. presented the said A., who was admitted, instituted, and inducted; that A., being so seised of the said moiety of the advowson, died; that the said moiety descended to the plaintiff; and that, the church having become vacant by the death of A., it belonged to the plaintiff to present in the turn of A.

The defendant pleaded, that A. was not seised of a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, *modo et formâ*.

It was found, by a special verdict, that Brauncewell-with-Dunsby was a rectory, and Anwick a vicarage,—the rectory having been theretofore appropriated and the vicarage endowed according to law; that R. G., being seised in fee of the advowson of the vicarage of Anwick, and the Earl of Bristol of the advowson of the rectory of Brauncewell-with-Dunsby, by deed, dated in March, 1703, reciting that the parties were desirous that the cure of the vicarage and rectory should both be supplied by one clerk, it was agreed, that, whenever the churches should be void, the Earl and R. G., their heirs and assigns, should present their clerks to the same *alterius vicibus*; that, in April, 1718, an act of union was made by the bishop of the diocese, with the consent of R. G., the then patron of the vicarage of Anwick, and the Earl of Bristol, the patron of the rectory of Brauncewell-with-Dunsby, and sealed with the episcopal seal, whereby the bishop “consolidated, united, and annexed the said vicarage and parish church of Anwick, with its rights, &c., to the aforesaid rectory and parish church of Brauncewell, and did, by those presents, commit the cure of the souls of the parishioners of the said church of Anwick to the then rector of the parish church of Brauncewell, and the rectors thenceforward for the time being of the said church of Brauncewell, and decreed that the said united churches should from that time be thereafter held and reputed as one benefice only, and that one fit person, at the alternate presentation of the Earl of Bristol and R. G., their heirs and assigns, to be canonically instituted, &c., should at all times thereafter possess the same,” &c.

The consenting parties to that arrangement, and their respective heirs, continued to present alternately one clerk to the united benefice, down to the year 1760.

In December, 1760, R. G., son and heir of R. G. in the act of union mentioned, and Susannah his wife, conveyed to A. “all that the perpetual advowson, nomination, donation, or alternate right of presentation, and free disposition, of and to the vicarage of the parish church of Anwick aforesaid, and all other the manors or lordships, advowsons, impropriations, tenements, tithes, hereditaments, and parts and shares of manors or lordships, advowsons, &c., of them, the said R. G. and Susannah his wife, or either of them, situate and being in Anwick aforesaid.”

The special verdict further found that the title of A. to the said moiety of the said advowson of the church of Brauncewell-with-Dunsby-and-Anwick, in the declaration mentioned, was derived in no other way than by that indenture:—

Held.—first, that, assuming the legal effect of the act of union to have been to unite the two churches of Brauncewell-with-Dunsby and Anwick, and thereby create a new advowson of the church of Brauncewell-with-Dunsby-and-Anwick, such new advowson did not pass by the deed of 1760, as “all that the perpetual advowson, nomination, donation, or alternate right of presentation and free disposition of and to the vicarage of the parish church of Anwick,” or

under the subsequent general words "and all other the advowsons and parts of advowsons situate and being in Anwick aforesaid."

Secondly, that the special verdict negating any other title in A., except that derived from the deed of 1760, the subsequent presentation by him, and the institution and induction of his clerk, as alleged in the declaration, did not constitute a seisin which gave him a title by usurpation,—such usurpation (since the 7 Ann. c. 18) being merely evidence of seisin, and not a title of itself.

Seemle, that the act of union *per se* could not so operate as to alter the rights of the respective patrons to their advowsons; but that some deed by the parties themselves was essential to give full effect to it.

QUARE IMPEDIT. The count stated, that one Samuel Hazlewood, theretofore, to wit, on the 4th of June, 1812, was seised of a moiety
 *209] of the advowson of the *church of Brauncewell-with-Dunsby-and-Anwick, in the county of Lincoln, as in gross by itself, as of fee and right, and was entitled to present to the same every alternate turn, that is to say, one turn in every two turns, the other moiety of the said advowson, and the other of the said two turns, then belonging to Frederick William, Earl of Bristol, as in gross by itself, as of fee and right; and, being so seised thereof, he the said Samuel Hazlewood afterwards, to wit, on the day and year last aforesaid, presented to the said church, then being vacant, in the proper turn of him the said Samuel Hazlewood, one R. D. R. Spooner, his clerk, who, on the presentation of the said Samuel Hazlewood, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our late sovereign lord George the Third: and, the said Samuel Hazlewood being so seised of the one moiety of the said advowson as aforesaid, and Frederick William, Earl of Bristol, being seised as of fee and right of the other moiety of the said advowson of the said church of Brauncewell-with-Dunsby-and-Anwick, and with the right to present to the same in the other of the said two turns as aforesaid, the said church after-
 *210] wards, to wit, on the 3d of June, 1826, became vacant *by the resignation of the said R. D. R. Spooner, whereby it then belonged to the said Frederick William, Earl of Bristol, as in his proper turn, to present to the said church; whereupon the said Frederick William, Earl of Bristol, to wit, on the 10th of June, 1826, presented to the said church the said Samuel Hazlewood his clerk, who, on the presentation of the said Frederick William, Earl of Bristol, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our late sovereign lord King George the Fourth: That the said Samuel Hazlewood, being so seised of the said moiety of the said advowson of the said church of Brauncewell-with-Dunsby-and-Anwick, as above mentioned, afterwards, to wit, on the 18th of March, 1846, died so seised of his said estate therein; after whose death the said moiety of the said advowson descended to the said Jane Mary, then the wife of Harrison Robinson, as the only sister and heiress of the said Samuel Hazlewood, the then patron and holder thereof, whereby the said Harrison Robinson and Jane Mary his wife became seised of the said moiety of the said advowson of the said church of Brauncewell-

with-Dunsby-and-Anwick, in right of the said Jane Mary: That the said church having become vacant by the death of the said Samuel Hazlewood as aforesaid, and still being vacant, it then belonged and still belongs to them, the said Harrison Robinson and Jane Mary his wife, in right of the said Jane Mary, to present as in their proper turn, that is to say, in the turn which was of the said Samuel Hazlewood as aforesaid, a fit person to the said church, being so vacant as last aforesaid; and the said John, Bishop of Lincoln, William, Marquis of Bristol, and Lord Charles Hervey, unjustly hindered them from presenting a fit person to the said church, and still do hinder them, whereby, &c.

The marquis pleaded that the said Samuel Hazlewood *was not seised of a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, in manner and form as the said Harrison Robinson and Jane Mary his wife had above alleged. Issue thereon. [*211]

The case came before the court upon a special verdict which found as follows:—

That, before and at the time of the making of the act of union hereinafter mentioned, Brauncewell-with-Dunsby was a parish in the county of Lincoln, and a rectory; and that Anwick was then also a parish in the said county, and a vicarage (the rectory of Anwick having been theretofore appropriated and the said vicarage endowed according to law): That, before and at the time of the sealing and delivery of the deed hereinafter mentioned, Robert Gardiner was seised as of fee in gross of the advowson of the said vicarage of Anwick, and John, Lord Hervey (afterwards John, Earl of Bristol), was seised as of fee of the advowson of the said rectory of Brauncewell-with-Dunsby; and that, the said respective parties being so seised as aforesaid, a certain deed bearing date the 29th of March, 1703, was then duly signed, sealed, and delivered, by the said Robert Gardiner and the said John, Lord Hervey, respectively, viz., one part by the said Robert Gardiner, and the other part by the said John, Lord Hervey, as follows:—

“Articles of agreement indented, had, made, and concluded upon the 29th of March, in the second year of the reign of Queen Anne, 1703, between Robert Gardiner, of, &c., of the one part, and the Right Hon. John, Lord Hervey, Baron Ickworth, in the county of Suffolk, of the other part, as followeth: Whereas, the said Robert Gardiner standeth seised in his demesne as of fee of and in the advowson and right of presentation of and in the vicarage of the church of Anwick, in the said county of Lincoln, to him and his heirs: And whereas the said John, Lord Hervey, standeth seised in *his demesne as of fee of and in the rectory and right and presentation of, in, and to the rectory and church of Branswell, in the said county of Lincoln, the said church of Anwick and Branswell lying contiguous to each other: And whereas the said Robert Gardiner and the said John, Lord Hervey, are minded and desirous that the cure of the said vicarage and rectory [*212]

may for the future be supplied by one clerk: And whereas the said John, Lord Hervey, at the instance and request of the said Robert Gardiner, hath presented William Everingham, clerk, to the said church of Branswell, the said William Everingham being formerly presented to the said vicarage of Anwick, by the said Robert Gardiner, or those under whom he claims,—The said Robert Gardiner, in consideration thereof, and of the sum of 10s. to the said Robert Gardiner by the said John, Lord Hervey, in hand paid, &c., him for his heirs and assigns hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said John, Lord Hervey, and his assigns, the first and next advowson, nomination, presentation, and free disposition of the said vicarage of the church of Anwick aforesaid, whensoever or howsoever, by death, resignation, deprivation, cession, permutation, dismissal, or any other way, the said church first and next shall happen to be void, any honest and learned clerk to present to the same, and to do and perform any other matter or thing touching or concerning the same. Item. It is agreed by and between the said parties to these presents, that in regard to the said two churches of Anwick and Branswell are of small value, and may be well supplied by one clerk, which being united and laid together, will be a convenient maintenance for one person, and for the future may be supplied accordingly: The said John, Lord Hervey, doth hereby, for himself and his assigns, covenant and grant to and with the said Robert Gardiner, his heirs *and assigns, that, whensoever or howsoever the said rectory of Branswell shall be void after the first presentation made by the said John, Lord Hervey, to the said vicarage and church of Anwick, by virtue of these presents, as aforesaid, that then it may be lawful to and for the said Robert Gardiner, his heirs and assigns, to present one able and learned clerk to the said rectory and clerk of Branswell: And it is hereby declared and agreed that the said Robert Gardiner and the said John, Lord Hervey, their heirs and assigns, shall, from time to time, and at all times hereafter, whensoever or howsoever the aforesaid churches of Anwick and Branswell shall happen to be void, to present their clerks to the same by turns, *alterius vicibus*, without the let or molestation of either party to the other or of their heirs or assigns. In witness, &c.”

That, after the sealing and delivery of the said deed, and in pursuance thereof, and before the making of the said act of union hereinafter particularly mentioned, viz. on the 23d of December, 1717, the Rev. Henry Craske was duly presented, instituted, and inducted to the said rectory of Brauncewell-with-Dunsby, and also, on the same day, to the said vicarage of Anwick, on the presentation of the said John, Earl of Bristol, to the said rectory and vicarage respectively: That, from the time of the sealing and delivery of the said deed, until and at the time of the making of the said act of union hereinafter mentioned, the said

John, Lord Hervey (afterwards John, Earl of Bristol), continued to be and was seised as of fee of the said advowson of the said rectory of Brauncewell-with-Dunsby, and the said Robert Gardiner continued to be and was seised as of fee of the said advowson of the said vicarage of Anwick, subject respectively to the arrangement so made by the said deed; and that, from the time of the said institution and induction of the said Henry Craske, until and at the time of making the said act of *union hereinafter mentioned, the said Henry Craske continued to be, and was, the rector of Brauncewell-with-Dunsby [*214 aforesaid, and the vicar of Anwick aforesaid:

That, on the 26th of April, 1718, a certain act of union was made by the then Bishop of Lincoln, being the diocese in which the said parishes and also the said rectory and vicarage, were respectively situate, and which said act of union was made upon the petition and with the assent and consent of the said John, Earl of Bristol, and Robert Gardiner (so being respectively seised as aforesaid), as in the said act of union expressed, and of the said Henry Craske, so being such incumbent of the said rectory and vicarage respectively, and was duly signed by the said bishop, and sealed with his episcopal seal, and that all the facts recited therein are true, and which said act of union (being translated from the Latin language into the English language) was and is as follows, that is to say,—

“Edmund, by Divine permission, Bishop of Lincoln, to our beloved in Christ, Henry Craske, clerk, M.A., rector of the parish church of Brauncewell, and also vicar of the parish of Anwick, respectively in the county of Lincoln, and of our diocese and jurisdiction, of the alternate patronage, as it is said, of the Rt. Hon. John, Earl of Bristol, and Robert Gardiner, gentleman, and to all others whomsoever in any manner having, or who shall have, an interest in this behalf, health, and grace: Whereas, as we are informed, the fruits, rents, revenues, tithes, and emoluments of the rectory of the said parish church of Brauncewell (which parish hath only three families), not amounting to the annual value of 28*l.* of lawful money of Great Britain, are so small and slender that they are not sufficient for the proper maintenance of the minister according to the decency of the clerical order: Whereas also, the perpetual vicarage of the *parish church of Anwick aforesaid (which parish hath about twenty families) is only two miles and a half [*215 distant from the said rectory of Brauncewell (no river or stream lying between), the fruits of which vicarage, also not amounting to the annual value of 25*l.*, are not sufficient for the proper maintenance of the vicar there: Whereas, moreover, the said two benefices have been accustomed for many years past to be served by one minister; for which reason, and because the parish of Brauncewell consists of so small a number of inhabitants, the church of Anwick aforesaid may be conveniently served by the rector aforesaid; and for the causes aforesaid, and the better

support of one minister, the union and consolidation of the said benefices is thought convenient and necessary: And whereas, furthermore, the aforesaid The Rt. Hon. John, Earl of Bristol, and Robert Gardiner, the alternate patrons of the said benefices as before mentioned, and the aforesaid Rev. Henry Craske, the present incumbent of the same, in a petition subscribed with their hands, and presented to us, have signified their mutual assent and consent to the union of the said churches, and have humbly prayed that we would graciously condescend to unite, annex, and incorporate the said church of Anwick, with all its rights, members, and appurtenances, to the said church of Brauncewell aforesaid, and to consign the cure of the souls of the said church of Anwick to the rector of the said church of Brauncewell for the time being, and to do other matters requisite in the premises: And whereas, lastly, we have found, by an inquisition duly made and returned by virtue of our commission, that the said suggestions evidently contain the truth in every particular, and that the aforesaid petition in this behalf is agreeable to reason, and the causes themselves for making the union and consolidation of the said churches, to have been, and to be, true, just, *216] lawful, and sufficient, all and singular the matters which *are required by law in this behalf concurring: We, desiring to consult and look to the interest and advantage, as well of the minister, as of the church (as is meet), and considering the poorness of the said benefices, and moved by your entreaties in this behalf, Do, by and with the consent of all who are interested in this matter, as far as lies in our power, and the laws and statutes of the kingdom allow, of our certain knowledge, for us and our successors, bishops of Lincoln, by these presents consolidate, unite, and annex the said vicarage and parish church of Anwick, with its rights, members, and appurtenances, to the aforesaid rectory and parish church of Brauncewell: And we do by these presents commit the cure of the souls of the parishioners of the said church of Anwick to the now rector of the parish church of Brauncewell aforesaid, and the rectors henceforward for the time being of the said church of Brauncewell; and we will and decree by these presents that the said united churches shall from this time be hereafter held and reputed as one benefice only, and that one fit person, *at the alternate presentation of the said Rt. Hon. John, Earl of Bristol, and Robert Gardiner, their heirs and assigns*, to be canonically instituted in the same by the diocesan of the place for the time being, shall at all times hereafter possess the same; so that it shall be lawful for the aforesaid Henry Craske, and your successors whomsoever, under the name of rector of Brauncewell-with-Anwick, to take and obtain possession of both parish churches, and, so obtained and united together as aforesaid, to continue and retain *as one church and one benefice*, and the suits, rents, and revenues of the same, so united, with their appurtenances, you may and can freely and lawfully convert, dispose of, and apply to your own use and advantage, and so

may and can your successors: Provided always, nevertheless, that the due and accustomed charges of the said churches shall from time to *time be borne by you and your successors, and the sacred word [*217 of God sincerely and religiously performed in the said parish churches: Provided also that this union, annexation, and incorporation shall never in any manner tend to be understood to the prejudice or damage of our serene lord the King George, by the grace of God, of Great Britain, France, and Ireland, King, defender of the Faith, &c., or his successors, in the first fruits, tithes, subsidies, or any other charges whatsoever, in any manner duly chargeable upon the said churches, nor of us or our successors, bishops of Lincoln for the time being, or of the archdeacon of Lincoln: All and singular which matters, in order that they may obtain the force of perpetual firmness, we have caused to be confirmed, both by the subscription of our hand and appendage of our episcopal seal to this present writing, and by our ordinary and episcopal authority we confirm and approve by these presents. Dated the 26th of April, 1718, and in the third year of our consecration."

That, after the making of the said act of union, no more separate presentation of two different clerks to the said rectory of Brauncewell-with-Dunsby, and to the vicarage of Anwick, respectively, was made, as had been the case prior to the making of the said deed of the 29th of March, 1703, and the institution of the said Henry Craske; but that, from thenceforth, from the cession of the said Henry Craske, as hereinafter mentioned, and at all subsequent vacancies, one clerk was presented and instituted to the said united benefice; and such presentations were made, except in the case of lapse, as hereafter particularly mentioned, in alternate turns, by the respective parties claiming and deriving title under the said Robert Gardiner, and John, Earl of Bristol, respectively, in the manner hereinafter particularly mentioned:

That, upon the first vacancy which occurred after the *said [*218 act of union, on the 27th of June, 1730, Robert Gardiner, clerk, was instituted to the said united benefice, by the name of "the rectory of Brauncewell-with-Anwick, in the county of Lincoln," which had become vacant by the cession of the said Henry Craske in the said act of union named, on the presentation of Jane Gardiner, widow, relict of the said Robert Gardiner in the said act of union named, and who claimed and derived her title by and under the said last-named Robert Gardiner:—

That, upon the next vacancy which occurred after the said last-mentioned presentation, on the 3d of September, 1760, William Tonge, clerk, was instituted to the said united benefice, by the name of "the rectory of Brauncewell-with-Anwick, in the county of Lincoln," which had then become vacant by the cession of the said Robert Gardiner, clerk, on the presentation of the then Earl of Bristol, who claimed and

derived title by and under the said John, Earl of Bristol, in the said act of union mentioned :

That afterwards, and before the next presentation, viz. on the 23d of December, 1760, the Rev. Robert Gardiner, the eldest son and heir of the said Robert Gardiner in the said act of union mentioned, by Jane his wife, then deceased, being the said Jane Gardiner before mentioned, duly made and executed, to Samuel Hazlewood, of Heighington, in the county of Lincoln, the following indenture :—

The special verdict set out an indenture of the 3d of December, 1760, between the Rev. Robert Gardiner, of Washingborough, in the county of Lincoln, clerk (eldest son and heir of Robert Gardiner, late of Anwick, in the said county of Lincoln, and sometime of New Sleaford, in the said county of Lincoln, gentleman, deceased, by Jane his wife, (likewise deceased), and Susanna Gardiner, wife of the said Robert *219] Gardiner party hereto, *heretofore called Susanna Moore, spinster, of the first part, and Samuel Hazlewood, of Heighington, in the parish of Washingborough aforesaid, gentleman, of the other part; whereby,—after reciting that, by indentures of lease and release, bearing date respectively the 21st and 22d of March, 1758, the release being of seven parts, and made or mentioned to be made between the said Robert Gardiner (party thereto) and Susanna, his wife, of the first part, Charles Gardiner, eldest son and heir apparent of the said Robert Gardiner, by the said Susanna, his wife, of the second part, Edward Wythers and Margaret Wythers his wife, only child and heir of Richard Eadnall, deceased (who in his lifetime and at the time of his death was seised of the rectory impropriate and parsonage of Anwick, and the lands, tithes, and hereditaments thereunto belonging, and the advowson of the vicarage of the parish of Anwick aforesaid, to him and his heirs, as tenant of the freehold, in order that a common recovery might be had and suffered thereof, amongst other hereditaments, but which said rectory, parsonage, tithes, and advowsons were not comprised in the said recovery), of the third part, Thomas Peete (a mortgagee in fee of part of the messuages, lands, and hereditaments therein and hereinafter mentioned and described, who had long before received all the moneys due on his mortgage, as well principal as interest), of the fourth part, Thomas Newsome and John Sharpe, of the fifth part, William Lomax, of the sixth part, and Richard Moore, of the seventh part,—for the barring, defeating, and extinguishing of all estates tail and remainders, and reversions and other estates whatsoever, of, in, or to the manor or moiety of the manor, rectory, impropriate advowson, or alternate right of presentation, messuages, &c., therein and hereinafter mentioned and described, and for settling, conveying, and assuring the same, to, for, and upon the several uses thereafter to be declared, *220] *and in consideration of the sum of 1700*l.*, of, &c., to the said Robert Gardiner (party hereto) therein mentioned to be paid by the said Richard Moore, and of the further sum of 500*l.* to the said Charles Gardi

ner therein also mentioned to be paid by the said Richard Moore (making together the sum of 2200*l.*), and in consideration of 5*s.* a piece to the said Robert Gardiner (party hereto) and Susanna his wife, Charles Gardiner, and Thomas Peete, paid by Newsome and Sharpe, they the said Robert Gardiner (party hereto) and Susanna his wife, Charles Gardiner, and Thomas Peete, did grant, bargain, sell, alien, release, and confirm unto the said Thomas Newsome and John Sharpe, and to their heirs, amongst other lands and tenements, “All that the manor, or moiety or half part of the manor or lordship of Anwic^h, with the rights, royalties, members, and appurtenances thereof, in the county of Lincoln; and also *all that the rectory impropriate and parsonage of the parish church of Anwick* aforesaid, and all the arable lands, meadows, glebe lands, pastures, tithes of corn, grain, and hay, oblations, obventions, and appurtenances whatsoever to the said rectory impropriate or parsonage belonging or in any wise appertaining; and also *all that the perpetual advowson, nomination, donation, or alternate right of presentation and free disposition of and to the vicarage of the parish church of Anwick* aforesaid, and all the glebe lands, tithes, and profits thereto belonging and appertaining,” &c., &c. “And all other the manors or lordships, *advowsons, impropriations*, messuages, cottages, closes, lands, tenements, *tithes, hereditaments, and parts and shares of* manors or lordships, *advowsons, impropriations*, messuages, cottages, closes, lands, tenements, *tithes and hereditaments whatsoever* of them the said Robert Gardiner (party hereto) and Susanna his wife, Charles Gardiner, and Thomas Peete, or any of them, or wherein they, or any of them, *or any person or persons in trust for them, or any of them, had any estate of inheritance in possession, reversion, [*221 remainder, or expectancy, situate and being in Anwick and Ruskington aforesaid,”—upon certain trusts, with a covenant to levy a fine, &c. The deed then proceeded to create a term of one thousand years, to secure to Richard Moore the repayment of the 2200*l.* advanced by him with interest; and after reciting that the principal sum of 2200*l.* remained due to Moore, and that Samuel Hazlewood had lately contracted and agreed with the said Robert Gardiner (party hereto) for the absolute purchase of the said manor, moieties, rectory, advowson, messuages, closes, lands, tenements, tithes, hereditaments, and premises thereinbefore particularly mentioned and described, for the price or sum of 4000*l.*, whereout it was agreed that the 2200*l.* should be paid to Moore,—it was witnessed that, for and in consideration of 1800*l.* paid by Hazlewood to Gardiner (party thereto) they the said Robert Gardiner and Susanna his wife, or conveyed to Samuel Hazlewood “All and singular the said *moiety thereof, rectory impropriate, advowson, or alternates, of what-
presentation, messuages, cottages, closes, lands, tenements, and being within
soever the same may consist, hereditaments, and, and being within
particularly mentioned and described, situate, with their and
the fields, precincts, or territories of Anwick*

of their rights, royalties, members, and appurtenances," &c., subject to the term of one thousand years.

That the title of the said last-mentioned Samuel Hazlewood to the said moiety of the said advowson of the church of Brauncewell-with-Dunsby-and-Anwick in the declaration mentioned, was derived in no other way than by the said indenture :

That, upon the vacancy which occurred after the said last-mentioned presentation, to wit, on the 3d of March, *1769, John Andrews, *222] clerk, was instituted to the said united benefice, by the name of "the rectory of Brauncewell-with-Anwick-and-Dunsby, in the county of Lincoln," which had become vacant by the cession of the said William Tonge, clerk, on the presentation of Jane Hazlewood and Richard Moore, patrons for that turn, and which said Jane Hazlewood and Richard Moore claimed and derived title by and under the said Robert Gardiner in the said act of union mentioned :

That, upon the next vacancy which occurred after the said last-mentioned presentation, to wit, on the 19th of February, 1799, George Matthew, clerk, was collated to the said benefice, by the name of "the rectory of Brauncewell-with-Dunsby-and-Anwick, in the county of Lincoln," which had become vacant by the death of the said John Andrews, clerk, on the donation or collation of the then Lord Bishop of Lincoln for that turn, by reason of lapse, and which said lapse had occurred by reason of the neglect to present in due time by the parties then claiming under the said John, Earl of Bristol, in the said act of union mentioned :

That, upon the said vacancy which occurred after the said last-mentioned collation, to wit, on the 4th of June, 1812, R. D. R. Spooner, clerk, was instituted to the said united benefice, by the name of "the rectory of Brauncewell-with-Dunsby-and-Anwick, in the county of Lincoln," which had then become vacant by the cession of the said George Matthew, clerk, on the presentation of Samuel Hazlewood, in the declaration mentioned, and which said Samuel Hazlewood claimed and derived title by and under the said Robert Gardiner in the said act of union mentioned :

That, upon the next vacancy which occurred after the last-mentioned presentation, to wit, on the 16th of June, 1826, the said Samuel Hazlewood, clerk, within mentioned, was instituted to the said united benefice, *223] by *the name of "the rectory of Brauncewell-with-Dunsby-and-Anwick, in the county of Lincoln," which had then become vacant, by the resignation of the said R. D. R. Spooner, clerk, on the presentation of the defendant, Frederick William, then Earl of Bristol, and now Marquis of Bristol :

But, whether the advowson whereof the said last-mentioned Robert Gardiner was seised upon and immediately after the making of the said act of union, remained and continued in law "the advowson of the

vicarage of Anwick" aforesaid, as before the said act of union, the jurors said that they were ignorant:

That, upon the 18th of March, 1846, the said Samuel Hazlewood died, and thereupon the said united benefice, to which the said Samuel Hazlewood had been so presented and instituted as aforesaid then became and was, and is, vacant: But, whether or not, upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found, the said Samuel Hazlewood was seised of a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, in manner and form as in the declaration alleged, the jurors were ignorant, &c.

The special verdict further found, that the united benefice, from the time of the death of the said Samuel Hazlewood hitherto had been and still was vacant; and that more than six months had passed since the death of the within-named Samuel Hazlewood; and that the value of the said church by the year was and is 750*l*.

Peacock (with whom was *G. Hayes*), for the plaintiffs.(a)—The first question raised by this special verdict, *is, what was the effect of the act of union of the 26th of April, 1716. On the part [*224 of the plaintiffs it is submitted that it was, to unite the vicarage of Anwick to the rectory of Brauncewell-with-Dunsby, and so to create one benefice under the name of the church of Brauncewell-with-Anwick, with alternate rights of presentation in Gardiner and the Earl of Bristol. In *Harman v. Renew*, 1 Salk. 164, on a motion for a prohibition to a suit in the consistory court of London, on the statute 22 Car. 2, c. 11, which united the parish of St. Mary Bothew to the parish of St. Swithen, against the parishioners of St. Mary Bothew to have a contribution to the repair of the church of St. Swithen, HOLT, C. J., said, that, "at common law, by concurrence of parson, patron, and ordinary, churches might be united to one another, but not parishes." The report continues "It was said per POWELL, J., in a case in C. B., that union was of spiritual conusance till 37 H. 8, c. 21, and then the temporal court took conusance of it; and that the incumbency of the churches united is extinct; but tithes and *modus* continue afterwards. But per TREBY, C. J.—The ancient church or rectory remains not, but this is a new creature, a new church, a new parsonage, a *novum aliquod tertium*." Though there is a new church, the ancient rights of advowson remain: the alternate right of presentation is an advowson of the same nature as it was before; it may be in gross or appendant, as the prior rights were. In Burn's Ecclesiastical Law,(b)

(a) The points marked for argument on the part of the plaintiffs, were as follows:—"The plaintiffs will contend that the effect of the act of union, and the deed upon which it was founded, was, to create one benefice, with alternate rights of presentation; and that the facts show that Samuel Hazlewood in the declaration mentioned was seised of a moiety of the advowson and the right to present in alternate turns with the Marquis of Bristol. Also that the plaintiffs are entitled to succeed, the defendants not having shown title on their plea."

(b) Title *Union*, 8th edit. p. 36, 9th edit. p. 45.

it is said: "By the union of two churches, no change is made in the advowsons; that is, not only all rights are reserved to the patron or *225] *patrons, as before, but the nature of the advowsons continues the same; as, if one be appendant, and the other in gross, and that which is appendant is made the presentative church, and the patron of the church in gross hath the first turn, yet shall not the whole advowson be in gross, but it shall remain appendant for his turn who was patron of the advowson appendant, and in gross for his turn who was patron of the advowson in gross. Which being so (that is, the advowsons, not only as to the right, but even as to the nature of them, remaining the same as before), it seems to be an unreasonable doubt whether bishops and other ecclesiastical patrons can consent to an union by the statutes of the 1 Eliz. and 13 Eliz." [JERVIS, C. J.—It does not follow that the vicarage remains a vicarage.] No. The case of *Reynoldson v. Blake*, *Ld. Raym.* 192,(a) also shows that the effect of a union is as above stated. The plaintiffs there brought *quare impedit*, for hindering them to present to the church of St. Andrew's Wardrobe in London, and declared, that, by the great fire of London, 2 September, 1666, the parish churches of St. Anne, Blackfriars, and St. Andrew's Wardrobe, were burnt; and that, by the act of 22 Car. 2, c. 11, it was enacted that the parishes of St. Anne, Blackfriars, and St. Andrew's Wardrobe, should be united, and that the parish church of St. Andrew's Wardrobe should be rebuilt, and should be the parish church of both parishes; that the several patrons of the respective parish churches should present by turns to this new church; and that the patron of that church of which the endowments were of the greater annual value, should have the first presentation. The plaintiffs then averred, that the endowments of the rectory of the church of St. Andrew's Wardrobe were of greater annual value than the endowments *prædictæ vicariæ* *226] *ecclesiæ* of St. Anne, Blackfriars; that *Sir Thomas Gage was seised in fee of the rectory impropriate, to which the vicarage of St. Anne, Blackfriars, *ad tunc pertinebat*, and, being so seised of the rectory, and being *verus indubitus patronus inde, dedit et concessit*, by indenture, the said rectory to the plaintiffs, and divers others, and their heirs, as survivors of whom the plaintiffs brought this *quare impedit*; that James Cade, incumbent at the time of the fire of the church of St. Andrew's, Wardrobe, died, whereby the church became void; that King Charles the Second, as patron of the church of St. Andrew's, Wardrobe, presented Stoning, who was admitted, instituted, and inducted, which was the first turn after the fire; that Stoning died 6 W. & M., whereby the church became void; and it pertained to the plaintiffs to present as the second turn, &c., and the defendants disturbed them, &c. The second point was, whether by this union the appendancy of the vicarage of St. Anne's, Blackfriars, to the rectory, was destroyed;

(a) See *Lev. Ent.* 141, 3 *Ld. Raym.* 238.

for, if it were, it would be fatal to the plaintiffs, because there were not sufficient words in the grant of Sir Thomas Gage to convey an advowson in gross to the plaintiffs, and consequently the plaintiffs had no title. And as to this point, POWELL, J., "was of opinion that the appendancy was not destroyed, but that the right of presentation every second turn to the new church became appendant to the rectory, as the vicarage was before." But "NEVILL, J., and TREBY, C. J., against this, for the defendants, argued, that the appendancy was destroyed by the union, and then nothing passed by the grant of Sir Thomas Gage to the plaintiffs." Judgment was given for the defendants, which must have been upon the ground that the new advowson created by the act of union, was appendant in the same way as the old one was. At the end of the case, the reporter adds a note,—“POWELL, J., said to TREBY, C. J., that HOLT, C. J., agreed with him as to the second point, against the *opinion of TREBY.” And it is further said, that, on error in [*227 the King's Bench, “the judgment was affirmed, but reversed in parliament afterwards, as Levinz reports ;”(a) but no trace can be found of the ground of the reversal. In the course of his judgment, POWELL, J., says : (b) “Patrons of united churches have also several rights, and therefore the writ of right ought to be *de medietate advocacionis* ; and their possessions are also several, so that one may usurp upon the other, and drive him to his *quare impedit* ; and each of them, if he be disturbed, shall have his *quare impedit* against a stranger. So that tenants in common have several rights, but joint-possession ; coparceners several rights, but possessions partly joint and partly several : but patrons of united churches have both rights and possessions several. To prove which diversity, he cited 33 H. 6, 11 ; (c) 5 H. 7, 8 ; (d) 14 H. 6, 15 ; (e) Co. Litt. 186 b ; Windsor's case, Cro. Eliz. 688 ; Co. Ent. 489 a ; which last books prove, that, though in case of united churches there is but one advowson in right, yet every patron has the whole advowson to his turn ; but the writ of right must be according to the right.” (g) According to that authority, Samuel Hazlewood became seised, if of anything, of a moiety of the advowson of the new church created by the act of union, and a right to present *alterius vicibus* with the Marquis of Bristol. In Dyer, 259 a, it is said, that, by the union of two churches in A., they are so made one that the patron may bring *quare impedit* by the name of the church in A., without distinction of the one or the other : and that, if an advowson appendant and another in gross *be united, it will be appendant for one term, and in gross for the other. So, in Wilson v. Van Mildert, 2 Bos. & P. [*228 394, it was held, that, where three parish churches have been united by 22 Car. 2, c. 11, the benefice may be described in pleading as one

(a) 3 Lev. 437 ; Lev. Ent. 143.

(b) 1 Ld. Raym. 197.

(c) Odinsels v. The Prior of Makestoke, H. 33 H. 6, fo. 11, pl. 17.

(d) M. 5 H. 7, fo. 8, pl. 17.

(e) 8 H. 6, fo. 15 b, pl. 52.

(f) See Windom v. Kempes, F. Moore, 867 ; Dyer, 299, pl. 32.

rectory. HEATH, J., delivering the judgment of the court, says: "We must consider the operation of the law on the union: true it is, that there are still three distinct patrons, but there is one incumbent. By the union the patronage is preserved, but the incumbency of two of the benefices is destroyed; it is the incumbency and not the rectory, which is the subject of the suit; and, if that be well described, the plaintiff may maintain his action. What is said by POWELL, J., in Lord Raymond, 196, is material, viz., that, in case of united churches, there is but one advowson in right, and that every patron has the whole advowson in his turn. Consequently, there is but one rector and one rectory: if these were three distinct rectories, the incumbent could not hold them, even with dispensation. It is material to consider the pleadings in the case of union. In 11 H. 6, 33, the law is laid down by BABINGTON, C. J. If a consolidation be made of two churches, and an abbot hath an annuity out of the church consolidated to another, if the annuity be in arrear, and the abbot brings his writ of annuity, he must name the parson of the church to which the church is consolidated. In the case of Reynoldson v. Blake and The Bishop of London, the plaintiff brought *quare impedit* for hindering him from presenting to the church of St. Andrew's Wardrobe in London only, and in his declaration he states the union of that church with the church of St. Anne, Blackfriars, and he claims to present as patron of St. Anne, Blackfriars. The pleadings are Levinz's Entries, 141; and that was a union of a

*229] vicarage and a rectory, and the presentation, *though in right of the vicarage, was only to the church. The presentations to these united churches have been the same as in the present instance, as appears by the case cited from 3 Wilson, 214.(a) From these instances, it may be inferred that the presentation, in case of union, may be either way, and that this is a proper description. Much reliance has been had on the 68th section of the act, which reserves to the several parishes their distinct rights. Nothing can be inferred from thence in respect to the incumbency. It was a cautious proviso, perhaps necessary, because the act unites the parishes, whereas, at common law, the churches only could be united." Austyn v. Twyne, Cro. Eliz. 500, is also an authority to show that this is a valid union. Besides, it being admitted upon the face of the pleadings that Samuel Hazlewood did present to the united benefice of Brauncewell and Anwick, and that the Marquis of Bristol was seised of one undivided moiety of the advowson of the united church, and duly presented in his turn, it is not competent to the defendants now to contend that there is no such church as the church of Brauncewell-with-Dunsby-and-Anwick.

There having been alternate presentations to the united church, from the time of union downwards, by those under whom the plaintiffs and the Marquis of Bristol respectively claim, each has obtained a title

(a) The Grocers' Company v. The Archbishop of Canterbury.

against the other by virtue of the statute 8 & 4 W. 4, c. 27, ss. 30, 31, 34.(a) [JERVIS, C. J.—The special verdict finds *that the only [*230 title of Hazlewood was under the deed of the 23d of December, 1760.]

Assuming this to have been a valid union of the two churches, with alternate rights of presentation in the patrons of each, the next question is, whether the indenture of the 23d of December, 1760, was sufficient to convey to Samuel Hazlewood the title which was in Robert Gardiner. By that deed, Robert Gardiner professes to convey to Hazlewood “all that the rectory impropriate and parsonage of the parish church of Anwick, and all the arable lands, &c.; and also all that the perpetual advowson, nomination, donation, or alternate right of presentation and free disposition of and to the vicarage of the parish church of Anwick aforesaid, and all the glebe lands,” &c. There can be no doubt that it was the intention of the parties to convey the alternate right *of presentation which Robert Gardiner then had to the united [*231 church of Brauncewell-with-Anwick. And, at all events, the general words are amply sufficient to pass that right. [CRESSWELL, J.—The general words are all limited to Anwick.] This is a mere question of parcel or no parcel: the grantor evidently intends to convey all he possessed in connexion with what had formerly been the vicarage of Anwick. In Dyer, 323 a, is the following case:—Upon evidence in *quare impedit* for the messuage of T. in the county of Worcester, parcel of the possessions of the college of Westminster, it was moved whether the advowson thereof passed in a lease for years made in the time of Edward 6, in the second year, to Sir T. S. (who was an admiral, and attainted), by the name of “all the hereditaments situate, lying, and being in T.,” where the vicarage was; and it was held by the court

(a) Section 30 enacts, “that, after the 31st of December, 1833, no person shall bring any *quare impedit* or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned, that is to say, the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.”

Section 31, “that, when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by His Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by His Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop.”

Section 34, “that, at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.”

that it passed, for, it hath some being in the town and church of the vicarage, because the view in a writ of right of advowson shall be given in the church, &c., although it does not lie in livery, nor is visible nor palpable; to which CATLYN and WRAY (Justices) agreed. In Comyn's Digest, *Advowson* (C 1), it is said: "If there be a grant of all his tenements, or all his hereditaments in D., the advowson of D. passes, though it be not particularly named." [JERVIS, C. J.—That is the case in *Dyer*.] The words here used, it must be conceded, are not very precise: but the court will endeavour to discover the intention of the parties. [CRESSWELL, J.—Are there any words professing to pass anything in Brauncewell? JERVIS, C. J.—We are not construing a will: neither is this, as you assume, a question of parcel or no parcel.] *Falsa demonstratio non nocet*. [CRESSWELL, J.—Is there *any* demonstration here?] That which the grantor professes to convey is as much within Brauncewell as within Anwick. In *Gully v. The Bishop of Exeter*, 4 Bingh. 290 (E. C. L. R. vol. 13, 15), 12 J. B. Moore, *232] 591 (E. C. L. R. vol. 22), it was held that an advowson in gross passes in a will under the word "tenement."

Presentation is the only seisin that can be had of an advowson: Watson's Clergyman's Law, 278. By the presentation alleged in the count, Hazlewood acquired at least a seisin by wrong as against Gardiner. [CRESSWELL, J.—The declaration begins with alleging a seisin in fee in Samuel Hazlewood, and a presentation in right of that seisin. You are now assuming that he gained a title by means of that presentation.] Hazlewood by that presentation clearly obtained a seisin sufficient to entitle him to present when the church became next vacant: Watson, pp. 131, 132; *Tufton v. Temple*, Vaughan, 1, 10.

The Marquis of Bristol sets up no title to present to this turn. If he were to succeed, therefore, in this action, he could not present his clerk to the bishop.

Cowling (with whom was *Scotland*), contra.—The first question is, what was the effect of the act of union. It is submitted that it made no alteration in the respective advowsons. The facts are these:—Some time before the act of union, Gardiner being seised of the advowson of the vicarage of Anwick, and the Earl of Bristol of the advowson of the rectory of Brauncewell-with-Dunsby, they (in March, 1703) agreed by deed, that, in future, each of them should present in turn to the two livings; not that the same incumbent should be presented to both churches, for that could not be: Burn's Ecclesiastical Law, *Plurality*, I;(a) *Alston v. Atlay*, 7 Ad. & E. 311 (E. C. L. R. vol. 34), 6 N. & M. 686 (E. C. L. R. vol. 36). To obviate the difficulty, they apply to the bishop to unite the two churches, and they obtain an act of union *233] *of a qualified description, to make it lawful for one clerk to hold the two benefices. [MAULE, J.—Was it lawful for the bishop to

(a) 9th edit., Vol. IV. pp. 118, 119.

license the same clerk to hold the two livings? and, if so, might he not do so for all time, as he affects to do by the act of union?] It is submitted that he might. [CRESSWELL, J.—Would a presentation to the rectory of Brauncewell-with-Anwick do?] It would: Brauncewell-with-Anwick was in future to be the presentative church. Unions are of many kinds, as appears from Lyndwood's Provinciale,^(a) where this sort of union is instanced,—“*Fit etiam unio ecclesiarum, sic quod unus sit prælatus ambarum; et tunc utraque remanet in statu suo ut prius, exceptâ solâ prælaturâ.*” And see Godolphin's Repertorium Canonicum, p. 170. [JERVIS, C. J.—There may be an absolute fusion of churches by consent of the respective patrons and the ordinary. Why may not that have been the case here?] This does not purport to be a union of that sort. The parties only apply to the bishop to make the qualified kind of union before mentioned. An advowson can only pass *by deed*: Com. Dig. *Advowson* (C 1). Here, there is no deed by the patron; merely a petition to the bishop, under his hand. There is no express surrender to the bishop: and there cannot be an implied surrender. “The advowson, or patron's right to present, is a temporal, and not a spiritual inheritance:” Godolphin, p. 209. Union, it is admitted, is a spiritual thing: *Austyn v. Twyne*, Cro. Eliz. 500: Gidson's Codex, Tit. 88, c. 1, p. 920. The only authority in support of the view that the act of union creates a new advowson, is the opinion of TREBY, C. J., in *Reynoldson v. Blake*, 1 Ld. Raym. 196: but that is contrary to the opinions of HOLT, C. J., and POWELL, J.: and, though the ground upon which the judgment of the King's Bench in that case was reversed in the House of Lords, is not stated in *Levinz, it obviously must have been, that the House of Lords thought the opinion of TREBY, [*234 C. J., was wrong. [JERVIS, C. J.—The case in *Dyer*, 259 a, is very like this. There, there might have been a union by deed. Lyndwood and other writers speak of an act of union by the spiritual court: but there is no instance of that to be found in the books.] The case of *Wilson v. Van Mildert*, 2 Bos. & P. 894, is an authority against the plaintiffs: HEATH, J., there says: “By the union, the patronage is preserved, but the incumbency of the two benefices is destroyed.” The result of the authorities is this, that, by virtue of the agreement, each had a right to present in turn, but the advowsons remained the same as before. [MAULE, J.—We find no instance of a union or consolidation *by deed*, nor any case, or the authority of any text-writer, to show that a deed is necessary to the complete union of two churches.] Most of the cases have occurred since the statute 17 Car. 2, c. 3. [JERVIS, C. J.—The 27 H. 8, c. 21, which speaks of certain unions being good and valid, is very embarrassing to the argument.]

With regard to the statute of limitations, 3 & 4 W. 4, c. 27, the

(a) Lib. III. pt. 9, p. 159.

answer is, that, if no such advowson as is here described existed, the statute cannot create it.

Assuming, however, that the argument urged on the other side is correct, that the two former advowsons are extinct, and that this supposed *novum aliquod tertium*, that is, the advowson mentioned in the declaration, arises out of their ashes,—it is submitted that that advowson did not pass by the deed of the 23d of December, 1760: the words of that deed are quite inadequate to pass it. The deed professes only to pass that which is in Anwick: the new advowson, if it be one, is in Brauncewell. None of the cases cited upon this point have any application.

*235] A title in Hazlewood by wrong is expressly excluded *by the terms of the special finding,—“that the title of the said Samuel Hazlewood, to the said moiety of the said advowson of the church of Brauncewell-with-Dunsby-and-Anwick, in the declaration mentioned, was derived in no other way than by the said indenture.” Besides, a presentation does not make a seisin. The statute 7 Anne, c. 18, was passed expressly to prevent that evil consequence: it enacts “that no usurpation upon any avoidance in any church, vicarage, or other ecclesiastical promotion, shall displace the estate or interest of any person entitled to the advowson thereof, or turn it to a right; but he or she that would have had a right if no usurpation had been, may present, or maintain his or her *quare impedit* upon the next or any other avoidance, if disturbed, notwithstanding such usurpation.” *Tuften v. Temple* does not apply here: no induction is found in the case, but only presentation and institution: there is nothing, therefore, that is equivalent to a taking of esplees.

The defendant has no need of a writ to the bishop: it is enough for him to deny the title set up by the plaintiffs.

Peacock, in reply.—The result of the case of *Reynoldson v. Blake*, is, that, after the union, the plaintiff had a right to present in his turn to the united churches, as described in the act of union: the case, therefore, is a distinct authority in favour of the plaintiffs. There is since the union but one incumbency, viz. of the new church. In *Coppledick v. Tansey*, Hutton, 31, the plaintiff brought a *quare impedit* against the incumbent, the patron, and the ordinary, *quod permittant ipsum presentare ad ecclesiam de Ulceby*. The patron pleaded “that there is no such church called Ulceby in the county of Lincoln,” *upon which issue *236] was joined: “and this plea being tried at Lincoln, before Baron BROMLEY, it was found for the defendant; for, there was an union of the church of Fordington to Ulceby, and it was called Ulceby-cum-Fordington: and it was said that institutions and presentments were to Ulceby; and Ulceby was the greater, and Fordington was the lesser church, and united, and therein had lost its name. It was agreed, that it being known by the one or by the other name, had been sufficient to

have found for the plaintiff." It is said here, that Hazlewood's presentation will not avail to create a title in him, because there is no induction found by the special verdict. If that, however, be material, induction is admitted on the pleadings. [TALFOURD, J.—You cannot use an admission on the record as evidence of a prior seisin.] In Roscoe on Real Actions, p. 234, it is said: "When a lay patron pleads plenarty by his own presentation, it is not necessary for him to show a right of patronage in his plea, for, the presentation, admission, and institution of his clerk, give him a sufficient title in a *quare impedit*." [MAULE, J.—That is, where it is pleaded in answer to another claiming to have his clerk instituted: the defendant says that cannot be done, because the bishop has already instituted a clerk, who fills the living.] In Burn's Ecclesiastical Law, title *Benefice*, v., p. 170, it is said: "The clerk by institution or collation hath the cure of souls committed to him, and is answerable for any neglect in this point. And, as to the temporalities; whereas, presentation doth give to the clerk a right *ad rem*, so, institution or collation do give him a right *in re*: and therefore, in virtue of collation, as well as of institution, the clerk may enter into the glebe, and take the tithes; though, for want of induction, he cannot yet grant or sue for them." To render the union operative, it was not necessary that there should be any deed under seal: the consent of the patrons only was necessary: the union is *an act of the ecclesi- [*237 astical court, operating, not upon the advowson, but upon the right of presentation. [JERVIS, C. J.—For what purpose was the statute 27 H. 8, c. 21, passed?] All the authorities show that that statute did not affect unions at common law. The owner does not part with his right of advowson when he consents to a union: but the law substitutes an alternate right of presentation. Subject to that, the original advowson remains. [JERVIS, C. J., referred to Windsor v. The Archbishop of Canterbury, Cro. Eliz. 687, 5, Co. Rep. 102 a, where it is said by the court that, "where two churches are united and consolidated, and the patrons agree to present, the one two turns, the other a third turn, as this case is, there either of them hath the entire church for that time."] Gardiner, being seised, by the deed of 1760 conveys what he calls "all that the perpetual advowson, nomination, donation, or alternate right of presentation, and free disposition of and to the vicarage of the parish church of Anwick." [MAULE, J.—Before the union, he was seised of the advowson of the vicarage of Anwick. What is there to take it out of him? Does he not remain seised of it?] No. He is seised *de medietate advocacionis* of the new church,—not of a moiety of the rectory and a moiety of the vicarage. The general words, at all events, are amply sufficient to convey the interest which Gardiner really had. [JERVIS, C. J.—In Viner's Abridgment, *Advowson* (A), pl. 2, it is said "*Advocatio medietatis ecclesiæ* is, where there are two several patrons and two several incumbents in one church, one of one

moiety, and the other of the other, and one part of the church and town allotted to the one, and the other part to the other. But, in the case of parceners agreeing to present in turn, where there is only one church, and one incumbent, it is *medietatis advocacionis ecclesie*." For *238] which Viner cites Co. Litt. 17 b, *18.] Whatever words would pass the old advowson, are sufficient to pass the new one. [MAULE, J.—You cannot strain the general words, where the particular words are manifestly insufficient. JERVIS, C. J.—In Viner, title *Advowson* (A), pl. 7, I find the following case:—"The King was seised of the rectory of D., and of the advowson of the vicarage of D., and granted the said rectory, *with the appurtenances, ac etiam Vicariam Ecclesie præd.* And, *per tot. cur.*, the advowson of the vicarage did not pass by these words in the case of the King, nor even in the case of a common person: but WALMSLEY, J., held, that, if he had granted *ecclesiam suam de D.*, it might have been otherwise."] A perfectly accurate description is never requisite, provided you can clearly see what it was that was intended to pass: and here there can be no doubt of the grantor's intention. In *Barnes v. Messinger*, 13 East, 251, the rector of Bromfield parish having, from the year 1765 (as far back as living testimony could carry it) to 1799, received the tithes of a certain meadow called *the demesne*, lying in a part of the township of Kelsick, in the parish of Holme Cultram, without interruption or claim from the rector of that parish (other parts of Kelsick lying in Bromfield), conveyed to the plaintiff in 1799 a messuage and lands *in Kelsick, in the parish of Bromfield*, and also all *tithes* of corn arising *within the township of Kelsick aforesaid*, or within the townfields, territories, precincts, or *titheable places thereof*: and it was held that this was evidence against the occupier of *the demesne* meadow, though lying in Holme Cultram parish, of a title to the tithes in the rector of Bromfield before the conveyance to the plaintiff; and that the words of the deed were sufficient to convey them.

JERVIS, C. J.—I am of opinion that the defendant in this case is *239] entitled to the judgment of the court. If, in order to determine the question before us, it were necessary very narrowly and precisely to scan the act of union, and to pronounce our opinion as to its legal effect, I for one should have desired time for consideration; because I do not see how the advowson, which lies in grant, is to pass by the mere act of union, which is an act of the ecclesiastical court: and, on the other hand, I should be slow to come to a decision contrary to what has been laid down by text-writers of high reputation, who treat it as valid at common law. But, in the view I take, it is quite unnecessary to pronounce any opinion as to the legal operation and effect of the act of union, unaccompanied by any deed of the parties; for, if the act of union be, as is contended on the part of the plaintiffs, an operative act, so as to unite into one church the rectory of Braunce-

well-with-Dunsby and the vicarage of Anwick, and to create a new advowson by the name of the rectory of Brauncewell-with-Dunsby-and-Anwick, then I am of opinion, upon the second point, that the advowson of the church so united did not pass by the terms of the deed of the 23d of December, 1760; for, it is not, as it was said by Mr. *Peacock* to be, a question of parcel or no parcel,—where there is a description that is satisfied by a part of the thing which is intended to be described, and you are to see whether anything more was intended to pass. It is conceded that there must be a description by apt words: but here we find no words to pass the advowson of the church so united. The deed professes to pass “all that the rectory impropriate and parsonage of the parish church of Anwick, and all the arable lands, &c.; and also all that the perpetual advowson, nomination, donation, or alternate right of presentation and free disposition of and to the vicarage of the parish church of Anwick aforesaid,” which vicarage, if the act of union is of any force, does not exist. And, if the act of union had not the effect of uniting the two churches, there is a misdescription in the declaration; for, in that case, Samuel *Hazlewood was not seised of “a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick.” (a) [*240]

As to the other point which has been argued, viz., that the subsequent presentations operated a disseisin, and so created a title by wrong in Samuel Hazlewood, or those under whom he claimed,—I apprehend that point does not properly arise here. The issue is, whether or not Samuel Hazlewood was seised of a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick: and the special verdict expressly finds that the title of Samuel Hazlewood to the said moiety of the said advowson of the church of Brauncewell-with-Dunsby-and-Anwick in the declaration mentioned, was derived in no other way than by the said indenture. It may be, on Mr. *Peacock's* argument, that, in the former state of the law, the effect of the deed might be unimportant, where there is a clear disseisin: but the statute of Anne says that usurpation shall not displace the lawful title, but you may proceed by a possessory action, and thereupon the admission or presentation would be evidence of title only, and not title in itself. I apprehend, therefore, that it is not an estoppel on the defendant, so as to preclude him from denying the seisin alleged. The seisin is not established, because the special verdict negatives any title other than that which the deed of December, 1760, conveys, and that deed fails to make out the title alleged in the declaration.

MAULE, J.—I am entirely of the same opinion. The lord chief justice has accurately and fully expressed the reasons which have induced me to come to that conclusion.

CRESSWELL, J., and TALFOURD, J., concurred.

Judgment for the defendant.

(a) The decision on this point was overruled by the court of error: vide post, p. 245.

***241] *IN THE EXCHEQUER CHAMBER.**

HARRISON ROBINSON and JANE MARY his Wife v. The MARQUIS OF BRISTOL and Others. June 9, 1852.

A count in *quare impedit* stated that one A. was seised in fee of a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, and was entitled to present to the same every alternate turn, the other moiety of the advowson belonging to B.; that A., in his turn, being so seised, presented C., who was on such presentation admitted, instituted, and inducted; that afterwards the church became vacant by the resignation of C., whereupon B. presented the said A., who was admitted, instituted, and inducted; that A., being so seised of the said moiety of the advowson, died; that the said moiety descended to the plaintiff; and that, the church having become vacant by the death of A., it belonged to the plaintiff to present in the turn of A.

The defendant pleaded, that A. was not seised of a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, *modo et formâ*.

It was found, by a special verdict, that Brauncewell-with-Dunsby was a rectory, and Anwick a vicarage,—the rectory having been theretofore appropriated and the vicarage endowed according to law; that R. G., being seised in fee of the advowson of the vicarage of Anwick, and the Earl of Bristol of the advowson of the rectory of Brauncewell-with-Dunsby, by deed, dated in March, 1703, reciting that the parties were desirous that the cure of the vicarage and rectory should both be supplied by one clerk, it was agreed, that, whenever the churches should be void, the Earl and R. G., their heirs and assigns, should present their clerks to the same *alterius vicibus*; that, in April, 1718, an act of union was made by the bishop of the diocese, with the consent of R. G., the then patron of the vicarage of Anwick, and the Earl of Bristol, the patron of the rectory of Brauncewell, and sealed with the episcopal seal, whereby the bishop “consolidated, united, and annexed the said vicarage and parish church of Anwick, with its rights, &c., to the aforesaid rectory and parish church of Brauncewell, and did, by those presents, commit the cure of the souls of the parishioners of the said church of Anwick to the then rector of the parish church of Brauncewell, and the rectors thenceforward for the time being of the said church of Brauncewell, and decreed that the said united churches should from that time be thereafter held and reputed as one benefice only, and that one fit person, at the alternate presentation of the Earl of Bristol and R. G., their heirs and assigns, to be canonically instituted, &c., should at all times thereafter possess the same,” &c.

After the making of this act of union, no more separate presentations to the rectory of Brauncewell and vicarage of Anwick respectively were made; but from thenceforth one clerk was presented and instituted to the united benefice, by the name of “the rectory of Brauncewell-with-Anwick,” in alternate turns, by the parties claiming title under R. G. and the Earl respectively.

In December, 1760, R. G., son and heir of R. G. in the act of union mentioned, and Susannah his wife, conveyed to A. “all that the perpetual advowson, nomination, donation, or alternate right of presentation, and free disposition, of and to the vicarage of the parish church of Anwick aforesaid, and all other the manors or lordships, advowsons, impropriations, tenements, tithes, hereditaments, and parts and shares of manors or lordships, advowsons, &c., of them, the said R. G. and Susannah his wife, or either of them, situate and being in Anwick aforesaid.”

The special verdict further found that the title of A. to the said moiety of the said advowson of the church of Brauncewell-with-Dunsby-and-Anwick, in the declaration mentioned, was derived in no other way than by that indenture:—

Held, that, by the act of union, a new presentative benefice was created, wholly separate and distinct from the former benefices; and that the patronage of this new presentative benefice was in the owners of the former advowsons in turn,—the advowsons remaining for this purpose unchanged in all their qualities, and transmissible as before.

Held, also, that the right which R. G. had was well described in the declaration as a “moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, as in gross by itself, as of fee and right;” and that such right was duly conveyed to A. by the deed of December, 1760; reversing the judgment of the Common Pleas.

QUARE IMPEDIT. Judgment having been given for the defendant,

the Marquis of Bristol, in the court below (*antè*, p. 208), a writ of error *was brought thereon, and argued in the Exchequer Chamber in Michaelmas Vacation, 1851, before ALDERSON, B., [*242 PATTESON, J., COLERIDGE, J., WIGHTMAN, J., ERLE, J., PLATT, B., and MARTIN, B., by *Peacock* (with whom was *G. Hayes*) for the plaintiffs, and *Cowling* (with whom was *Scotland*) for the defendants.

The points made and the authorities cited on the part of the plaintiffs, were as follows:—

1. That the legal effect of the union of the two churches of Brauncewell-with-Dunsby, and Anwick, by the act of union of April, 1718, was, to make a new presentative benefice of the united churches, the patronage of which was in the owners of the former benefices in turns, in the manner provided for by that instrument: *Reynoldson v. Blake*, 1 Lord Raym. 195, 3 Lord Raym. 238, Lev. Ent. 141; *Harman v. Renew*, 1 Salk. 165; *Anonymous*, 3 Dyer, 259 a; *Austyn v. Twyne*, Cro. Eliz. 500; *The Queen v. Page and the Bishop of London*, Cro. Eliz. 719; Com. Dig. *Advowson* (C 1); *Wilson v. Van Mildert*, 2 Bos. & Pull. 394; *Hartley v. Cooke*, 9 Bingh. 728 (E. C. L. R. vol. 23), 3 M. & Scott, 230 (E. C. L. R. vol. 30); *Watson's Incumbent*, 185, 186.

*2. That, assuming that the effect of the act of union was *not* to create a new advowson, it was admitted on the record that [*243 there was such an advowson and such a church as that of Brauncewell-with-Dunsby-and-Anwick: *Coppledick v. Tansey*, Hutton, 31.

3. That the indenture of the 23d of December, 1760, was sufficient to convey to Samuel Hazlewood all Robert Gardiner's interest in the alternate right of presentation to the united church of Brauncewell-with-Dunsby-and-Anwick: *Anonymous*, 3 Dyer, 323 a.

4. That, assuming that the deed of the 23d of December, 1760, was *not* sufficient to convey Gardiner's interest to Hazlewood, the institution of Spooner, in the year 1812, upon the presentation of Hazlewood, operated as a disseisin, and so gave Hazlewood a title by wrong: 3 & 4 W. 4, c. 27, ss. 30, 31, 34.(a)

5. That the plea, admitting Hazlewood's possession, and not showing that the Marquis of Bristol had any interest in the turn in question, was a bad plea: *Tuften v. Temple*, Vaughan, 1, 10; *Rex v. The Bishop of Landaff*, 2 Stra. 1005; *The King v. The Bishop of Chester*, Skinner, 651, 657; *The King v. The Bishop of Worcester*, 1 Mod. 276, 2 Jones, 8, 1 Freem. 7, Vaughan, 58; Com. Dig. *Pleader* (3 I. 9).

The points urged and authorities cited for the defendants, were as follows:—

1. That, notwithstanding the union, the old advowsons of the vicarage of Anwick and the rectory of Brauncewell-with-Dunsby still remained as before,—the only object and effect of the union, being, to operate a

a) *Antè*, 229.

perpetual dispensation, to enable the same incumbent to hold the two livings together: 3 Burn's Ecclesiastical *Law, *Plurality*, p. *244] 118; Lyndewood's Provinciale, Lib. III., tit. 9, p. 159; Godolphin's Repertorium Canonicum, 2d edit. c. IV., p. 169, 170; Gibson's Codex, tit. 38, c. I., p. 920; Ayliffe's Parergon, p. 516—518; Com. Dig. *Advowson* (C 1); 27 H. 8, c. 21; 22 Car. 2, c. 11, ss. 63—65; *Alston v. Atlay*, 7 Ad. & E. 289 (E. C. L. R. vol. 34), 2 N. & P. 491.

2. That the plea of the Marquis of Bristol did not admit that there was such an advowson and such a church as that mentioned in the count.

3. That, supposing such an advowson as alleged in the declaration did exist, the alternate right of presentation claimed by the plaintiff did not pass to Samuel Hazlewood by the deed of the 23d of December, 1760: Anonymous, 1 Cro. Eliz. 163; Com. Dig. *Advowson* (C 1); *Stukeley v. Butler*, Hobart, 168, 171.

4. That the acquisition of title by presentation in Samuel Hazlewood, was negatived by the finding in the special verdict that his title was derived in no other way than by the indenture of the 23d of December, 1760; and that there was no finding that Spooner was *instituted*, and consequently there could be no disseisin: 1 Burn's Ecclesiastical Law, title *Benefice*, p. 176.

5. That the plea of the Marquis of Bristol was a good plea: Com. Dig. *Pleader* (3 I. 4), (3 I. 9); *The King v. The Bishop of Worcester*, 1 Mod. 276, 2 Jones, 8, 1 Freem. 7, Vaughan, 53; *Rex v. The Bishop of Landaff*, 2 Stra. 1005; *The King v. The Bishop of Chester*, Skinner, 651, 657; *Nicolls v. Bastard*, 2 C. M. & R. 659.† [PATTESON, J., referred to *Rennell v. The Bishop of Lincoln*, 3 Bingh. 223 (E. C. L. R. vol. 11), 11 J. B. Moore, 139 (E. C. L. R. vol. 22).]

Cur. adv. vult.

*245] *ALDERSON, B., now delivered the judgment of the court. This was a writ of error from the judgment of the Court of Common Pleas.

The declaration was in *Quare Impedit*, and stated that Samuel Hazlewood was seised of a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, as in gross by itself, as of fee and right, and was entitled to present to the same every alternate turn, viz., one turn in every two turns, the other moiety of the said advowson, and the other of the said two turns, belonging to Frederick William, Earl of Bristol, as in gross by itself, as of fee and right. It then stated that Samuel Hazlewood, being so seised thereof, presented to the said church, then vacant, R. D. R. Spooner, his clerk, who, on such presentation, was admitted and inducted into the same, in the time of peace, *tempore* Geo. 3, and, things so standing, the church afterwards became vacant by the resignation of R. D. R. Spooner, whereby it belonged to the Earl of Bristol, in his proper turn, to present; where-

upon he presented Samuel Hazlewood as his clerk, who, on this last-mentioned presentation, was admitted and inducted, in time of peace, *tempore* Geo. 4. The declaration then averred, that, Samuel Hazlewood, being so seised of the moiety of the said advowson as above mentioned, afterwards died so seised, and that, after his death, the said moiety of the said advowson descended to Jane Mary, the wife of Harrison Robinson, as his only sister and heiress; whereby the said Harrison Robinson and Jane Mary his wife became seised of the said moiety of the said advowson. It then stated, that, on this vacancy by Samuel Hazlewood's death, it belonged to Harrison Robinson and Jane Mary his wife, in right of the said Jane Mary, to present; and then concluded by averring disturbance of their right by the defendants, the [*246 *Marquis of Bristol, Lord Charles Hervey, and the Bishop of Lincoln.

To this declaration the bishop pleaded that he only claimed his right as ordinary. Lord Charles Hervey only denied that he hindered the plaintiffs from presenting. The Marquis of Bristol pleaded that Samuel Hazlewood was not seised of a moiety of the said advowson of the church of Brauncewell-with-Dunsby-and-Anwick, in manner and form as the plaintiffs had alleged.

It is upon the proof of this plea alone that the question turns.

The special verdict finds, that, before and at the time of the making of a certain act of union, Brauncewell-with-Dunsby was a parish and rectory, and that Anwick was a parish and vicarage, the rectory thereof having been before appropriated and the vicarage endowed according to law. Then it finds, that, before and at the time of sealing and delivering the deed thereafter mentioned, Robert Gardiner was seised as of fee in gross of the advowson of the vicarage of Anwick, and John, Lord Hervey (afterwards Earl of Bristol), was seised as of fee of the advowson of the rectory of Brauncewell-with-Dunsby. It then finds a deed reciting as above, and that Robert Gardiner and Lord Hervey desired that the cure of both might be supplied by one clerk in future, and providing that Robert Gardiner should grant every alternate turn of presentation to Anwick to Lord Hervey, and should receive from Lord Hervey every alternate presentation of Brauncewell-with-Dunsby,—so that each party might alternately have the right in future of presenting to both at one time. The special verdict finds, that, from the time of the execution of this deed (20th March, 2d Anne) until the making of the act of union, both parties continued seised as before, and the deed was acted on, and that Henry Craske, clerk, the presentee of Lord Bristol, was, at the time of the act of union, the *incumbent of both livings. It then set out an act of union, dated [*247 the 26th of April, 1718, by which the Bishop of Lincoln, the ordinary, on the petition of the Earl of Bristol, and Robert Gardiner, and of

Henry Craske, the incumbent, united the two churches for the future. That act of union was as follows:—

“Edmund, by Divine permission, Bishop of Lincoln, to our beloved in Christ, Henry Craske, clerk, master of arts, rector of the parish church of Brauncewell, and also vicar of the parish church of Anwick, respectively in the county of Lincoln, and of our diocese and jurisdiction, of the alternate patronage, as it is said, of The Right Hon. John, Earl of Bristol, and Robert Gardiner, gentleman, and to all others whomsoever in any manner having, or who shall have, an interest in this behalf, health and grace: Whereas, as we are informed, the fruits, rents, revenues, tithes, and emoluments of the rectory of the said parish church of Brauncewell (which parish hath only three families) not amounting to the annual value of 28*l.* of lawful money of Great Britain, are so small and slender that they are not sufficient for the proper maintenance of the minister according to the decency of the clerical order: Whereas, also, the perpetual vicarage of the parish church of Anwick aforesaid (which parish hath about twenty families) is only two and a half miles distant from the said rectory of Brauncewell (no river or stream lying between), the fruits of which vicarage also, not amounting to the annual value of 25*l.*, are not sufficient for the proper maintenance of the vicar there: Whereas, moreover, the said benefices have been accustomed, for many years past, to be served by one minister; for which reason, and because the parish of Brauncewell consists of so small a number of inhabitants, the church of Anwick aforesaid may be conveniently served by the rector aforesaid, and, for *248] the causes aforesaid, and the better support of one *minister, the union and consolidation of the said benefices is thought convenient and necessary.” It further recites the petition and assent of the Earl of Bristol and Robert Gardiner, the alternate patrons, and of the incumbent; and that the bishop had found that the suggestions evidently contain the truth, and that the petition is agreeable to reason, and the causes for making the union true, just, lawful, and sufficient, all and singular the matters which are required by law in this behalf concurring. The act of union then proceeds:—“We, desiring to consult and look to the interest and advantage, as well of the minister as of the church (as is meet), and considering the poorness of the said benefices, and moved by your entreaties in this behalf, do, by and with the consent of all who are interested in this matter, as far as lies in our power, and the law and statutes of the kingdom allow, of our certain knowledge, for us and our successors, Bishops of Lincoln, by these presents consolidate, unite, and annex the said vicarage and parish church of Anwick, with its members and appurtenances, to the aforesaid rectory and parish church of Brauncewell, and we do by these presents commit the cure of the souls of the parishioners of the said church of Anwick to the now rector of the parish church of Brauncewell; and we will

and decree by these presents that the said united churches shall from this time be hereafter held and reputed as one benefice only, and that one fit person, at the alternate presentation of the said Rt. Hon. John, Earl of Bristol, and Robert Gardiner, their heirs and assigns, to be canonically instituted in the same by the diocesan of the place for the time, shall at all times hereafter possess the same, so that it shall be lawful for the aforesaid Henry Craske, and your successors whomsoever, under the name of rector of Brauncewell-with-Anwick, to take and obtain possession of both parish churches, and, so obtained and united together as *aforesaid, to continue and retain as one church and one benefice, and the fruits, rents, and revenues of the same so [*249 united, with their appurtenances, you may and can freely and lawfully convert, dispose of, and apply to your own use and advantage, and so may and can your successors."

After this act of union, no separate presentments were made; and, on the cession of Henry Craske, Robert Gardiner, clerk, on the presentation of the widow of Robert Gardiner named in the act of union, and claiming under him, was presented to the united benefice the 27th of June, 1730. On the next vacancy, the 3d of September, 1760, William Tonge, clerk, was instituted to the united benefice, on the presentation of the Earl of Bristol.

The special verdict then finds, that, after this last presentation, by lease and release dated the 23d December, 1760, Robert Gardiner and Susanna his wife,—the said Robert Gardiner being heir to the said Robert Gardiner party to the act of union,—conveyed to Samuel Hazlewood, in fee, *inter alia*, the manor and impropriate rectory of Anwick, and perpetual advowson, donation, or alternate right of presentation of the vicarage of Anwick, and disposition of and to the glebe lands, &c., belonging thereto: and the deed also included all other advowsons or parts of advowsons in Anwick. The special verdict then finds that the title of Samuel Hazlewood to the moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick was derived through this conveyance only, if at all. The special verdict then states, that, on the 23d of March, 1769, John Andrews, clerk, was instituted, on the presentment of Jane Hazlewood and Richard Moore, patrons deriving title under Robert Gardiner mentioned in the act of union; that, on the next vacancy, the Bishop of Lincoln collated George Mathews, on the lapse of Lord Bristol to present; that, on the next vacancy, R. D. R. Spooner, *clerk, was, on the 4th of June, instituted on the presentation of Samuel Hazlewood in the declaration mentioned, [*250 claiming title under the said Robert Gardiner; that, on the next vacancy, the 16th of June, 1826, Samuel Hazlewood was presented, on Spooner's resignation, by the Marquis of Bristol, the present defendant; and that, on the 18th of March, 1846, Samuel Hazlewood died.

These are all the material facts contained in the special verdict: and

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The special verdict then finds, that, after this last presentation, by lease and release dated the 23d December, 1760, Robert Gardiner and Susanna his wife,—the said Robert Gardiner being heir to the said Robert Gardiner party to the act of union,—conveyed to Samuel Hazlewood, in fee, *inter alia*, the manor and impropriate rectory of Anwick, and perpetual advowson, donation, or alternate right of presentation of the vicarage of Anwick, and disposition of and to the glebe lands, &c., belonging thereto: and the deed also included all other advowsons or parts of advowsons in Anwick. The special verdict then finds that the title of Samuel Hazlewood to the moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick was derived through this conveyance only, if at all. The special verdict then states, that, on the 23d of March, 1769, John Andrews, clerk, was instituted, on the presentment of Jane Hazlewood and Richard Moore, patrons deriving title under Robert Gardiner mentioned in the act of union; that, on the next vacancy, the Bishop of Lincoln collated George Mathews, on the lapse of Lord Bristol to present; that, on the next vacancy, R. D. R. Spooner, *clerk, was, on the 4th of June, instituted on the presentation of Samuel Hazlewood in the declaration mentioned, [*250 claiming title under the said Robert Gardiner; that, on the next vacancy, the 16th of June, 1826, Samuel Hazlewood was presented, on Spooner's resignation, by the Marquis of Bristol, the present defendant; and that, on the 18th of March, 1846, Samuel Hazlewood died.

These are all the material facts contained in the special verdict: and

the question is, whether on the facts, the issue raised as to the scisin of Samuel Hazlewood of the moiety of the reversion of the united churches of Brauncewell-with-Dunsby-and-Anwick is made out.

The Court of Common Pleas, in their judgment, have held that this is not made out by the plaintiffs, on the ground, that, if the effect of the union be to create a new advowson in moieties between the patrons of the two churches, there is no conveyance of this moiety of the advowson of the united church to Samuel Hazlewood by the deed of 1760. But we think that this view of the case cannot be supported. The nature of an union of two churches, at common law, is thus stated in Gibson's Codex, 962:—"By the union of two churches, no change is made in the advowsons; not only all rights are reserved to the patrons as before, but the nature of the advowsons remains the same; as, if one be appendant, and the other in gross, and that which is appendant is made the presentative church, and the patron of the church in gross hath the first turn; yet shall not the whole advowson be in gross, but remain appendant for his turn who was patron of the advowson appendant, and in gross for his turn who was patron of the advowson in gross." This we think, clearly means, not that the advowson of the presentative church has two distinct characters; but that the right of presentation shall go, as to one turn, with the conveyance of the advowson in gross, and, as to the other *turn, with the conveyance of
*251] that property to which the advowson appendant was appendant. But, according to the *dicta* of the judges in *Reynoldson v. Blake*, 1 *Ld. Raym.* 196, it seems to be established that the advowson of the presentative church is *quiddam tertium*, and belongs in moieties to the patrons of the two united churches: for, POWELL, J., lays it down; and TREBY, J.,—without any apparent dissent from NEVILL, J., though in some points they both differed from POWELL,—agreed with him in his opinion as to the rights of patrons of united churches. These rights, POWELL, J., says, are several, and therefore the writ of right of advowson ought to be *de medietate advocacionis*; and their possessions also are several, so that one may usurp upon the other, and drive him to his *quare impedit*, and each of them, if he be disturbed, may have his *quare impedit* against a stranger, and that though there is but one right of advowson. And he says afterwards, each patron has the whole advowson in his turn, but the writ of right must be according to the right, *i. e.*, as he says before, for a moiety of the advowson. And TREBY, C. J., says: "The church united is a new thing created, *novum aliquid tertium*, composed of both the ancient churches."

All this, we think, can well stand together, by our holding that the law is, in truth, that, by virtue of the act of union, a new presentative benefice is created, wholly separate and distinct from the former benefices; and that the patronage of the new presentative benefice is given, according as it is provided in the act of union itself, to the owners of

the former advowsons in turn,—which advowsons, however, for this purpose remain unchanged in all their qualities, and are to be conveyed as before, and with that conveyance carry the patronage of the respective turns to the whole newly-created presentative benefice.

*Now, this being, as we think it is, the law on this subject, [*252 we have to apply it to the facts here found by the special verdict.

Here, the two old advowsons are those of the rectory of Brauncewell-with Dunsby, and the vicarage of Anwick. The two churches are united by an act of union of the 26th of April, 1718; and the vicarage of Anwick, the advowson of which belonged in fee, in gross, to Robert Gardiner, was consolidated, united, and annexed to the rectory of Brauncewell, and both were in future to be made one church and one benefice only, at the alternate presentation of Lord Hervey and Robert Gardiner, by the name of Brauncewell-with-Anwick.

Now, in the first place, it appears from the special verdict that this church of Brauncewell-with-Anwick is the same as that called in the declaration the church of Brauncewell-with-Dunsby-and-Anwick: and, according to what we have before seen to be the true effect of an union like this, the advowson of this newly-created church is given to the two patrons in moieties. The advowson of the vicarage of Anwick belonged in fee to Robert Gardiner in gross, at the time of the act of union: therefore, according to the authority of POWELL, J., and TREBY, C. J., the whole advowson, at the time of the vacancy,—the turn being that of Robert Gardiner,—would be in gross also; and Robert Gardiner would have, according to the same authority, a moiety only: consequently, in describing his title on such an occasion, it would be right, in a declaration in *quare impedit* brought by him, to say that Robert Gardiner was seised of a moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, as in gross by itself, as of fee and right. This is the description of it in this declaration.

But, instead of Robert Gardiner, we have here Samuel Hazlewood's name introduced. We must, then, see *whether we can show [*253 that this property, thus properly described, has been conveyed duly from Robert Gardiner to Samuel Hazlewood.

Now, this brings us to the other branch of the law, previously, as we think, established,—that the right to this alternate presentation is inseparably annexed to the advowson of the old vicarage, which, for this purpose, remains, and is transmissible as before. Now, we think this is clearly made out by the conveyance of the 23d of December, 1760, by which Robert Gardiner's representatives, who had the advowson of the vicarage of Anwick in gross by itself, as of fee and right, have expressly conveyed that vicarage to Samuel Hazlewood in like manner. And we think this is exactly equivalent to a conveyance expressly of a moiety of the advowson of the new presentative benefice as in gross by itself, as of fee, to Samuel Hazlewood. After this con-

veyance, the title was in Samuel Hazlewood, as it is described in this part of the declaration, on which alone the Marquis of Bristol has thought fit to take an issue.

We think, therefore, that the plaintiffs have proved the issue on which this question turns, and that the Court of Common Pleas was wrong in deciding that they had not done so. And this makes it unnecessary for us to consider and determine the various other nice questions discussed in the able arguments of Mr. *Peacock* and Mr. *Cowling* before us.

The judgment of the Common Pleas must be reversed.

Judgment reversed.(a)

(a) The decision of the court below and of the court of error, from the manner in which the record was framed, left untouched the real question between the parties,—which was, whether, by a subsequent valid conveyance, the advowson of the vicarage of Anwick had been conveyed by the representatives of Samuel Hazlewood to the Marquis of Bristol.

*254] ***The WEST LONDON RAILWAY COMPANY v. The LONDON AND NORTH WESTERN RAILWAY COMPANY.**
June 5.

In 1836, a company (afterwards called the West London Railway Company) was incorporated by act of parliament, for the making of a railway from the Kensington Canal, to join the London and Birmingham (afterwards called the London and North-Western) and the Great Western railways, at a place called Holsden Green; and certain duties were by the act cast upon the company; and, amongst other things, it was provided, that, if the railway should be abandoned, or should, after its completion, cease for the space of three years to be used as a railway, the land taken by the company for the purposes of the act, should revert to the owners of the adjoining land.

In February, 1837, the West London Railway Company entered into an agreement with the Great Western Railway Company, under which the last-mentioned company bound themselves to stop certain of their trains at a point where their railway intersected the West London Railway, for the purpose of taking up or setting down passengers travelling on that line.

By a subsequent act (8 & 9 Vict. c. clvi.),—reciting, that “it had been found that the said West London Railway could not be worked, as a separate and independent undertaking, with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connexion with the said London and Birmingham Railway and the said Great Western Railway, or either of them, by both or either of the companies to whom the said last-mentioned railways belonged; that the West London Railway Company were therefore desirous of letting the said railway on lease to the London and Birmingham Railway Company; and that the last-mentioned company were willing to accept such lease, subject to certain terms and conditions which had been mutually agreed on between the said two companies,”—the West London Railway Company was authorized to lease to the London and North-Western Railway Company their railway, and all their rights, powers, and privileges in relation thereto,—subject to the provisions of the act, and to the performance of the conditions to be mentioned in such lease.

By the lease, which was afterwards executed in pursuance of this act, the London and North-Western Railway Company covenanted, amongst other things, that they would “at their own expense, during the continuance of the lease, *efficiently work* and repair the railway and works thereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges, and expenses, claims, and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway or works; but the West London Railway Company

shall have no control whatever over the working or management by the London and Birmingham (North-Western) Railway Company of the West London Railway or works."

In covenant by the West London Railway Company against the London and North-Western Railway Company for a breach of this covenant:—

Held, that the defendants were not bound to work the West London Railway in connexion with and as part of their own line; nor did they acquire by force of the lease, or of the act of parliament authorizing the making of the lease, any right, or incur any obligation, to call upon the Great Western Railway Company to stop their trains pursuant to the agreement of February, 1837.

Held also [post, p. 319], that, by the terms of their covenant, the defendants were not bound to work the West London Railway with *passenger* trains; but that they satisfied the obligation they had entered into, "*efficiently*" to work the railway, provided they worked it in a reasonable manner, and so as to indemnify the plaintiffs against any damage or any forfeiture that would result under the act of parliament from a failure to work the line.

COVENANT. The declaration stated, that, theretofore, and after the construction of the West London Railway thereafter mentioned, to wit, on the 10th of *March, 1846, by a certain indenture then [*255 made between the said West London Railway Company of the one part, and the London and Birmingham Railway Company of the other part,—profert,—the said West London Railway Company, under and by virtue and in the exercise of the powers and provisions in that behalf contained in an act of parliament made and passed in the 9th year of the reign of Her Majesty Queen Victoria, intituled "An act for enabling the London and Birmingham Railway Company to take a lease of the West London Railway," did, in consideration of a sum of money therein mentioned, and also in consideration of the yearly rents or sums of money, covenants, and conditions thereafter respectively reserved and contained, and by the said London and Birmingham Railway Company, their successors and assigns, to be respectively paid or accounted for, observed, and performed, grant, demise, and lease unto the said London and Birmingham Railway Company (amongst other things) the West London Railway, as authorized to be constructed by certain acts of parliament therein mentioned and referred to, and all stations, wharfs, buildings, and appurtenances thereto belonging, or held or enjoyed therewith, and the rates and tolls payable in respect thereof, together with all rights, powers, and privileges of the said West London Railway Company in relation thereto: and also a certain piece or parcel of land situate in the county of Middlesex in the *said indenture [*256 particularly described, and the rails, erections, wharfs, and other conveniences on the last-mentioned land, subject to certain provisions in the said indenture contained respecting the use and enjoyment of such last-mentioned land, and the rails, erections, and conveniences thereon: and also several other pieces or parcels of land belonging or adjoining to or situate near to the said West London Railway in the said indenture particularly described; and also the use of any new line of railway that might be formed for the purpose of extending the West London Railway to the river Thames,—to have, hold, exercise, and enjoy the same unto and by the said London and Birmingham Railway

Company for the term of nine hundred and ninety-nine years, to be computed from the 11th of March, 1845, subject to the London and Birmingham Railway Company, their successors or assigns, accounting for or paying, as the case might be, under the provisions thereafter contained, to the West London Railway Company, their successors or assigns, during the said term, such annual or other sum or sums of money as under the provisions thereafter contained should for the time being be payable; and it was thereby agreed, that, during the continuance of the said lease, the London and Birmingham Railway Company should, within twenty-one days after the 30th of June and the 31st of December in every year, carry to the credit of the West London Railway Company such a sum of money as should be equivalent to one-fourth part of the gross sums received by the London and Birmingham Railway Company during the period of six calendar months next immediately preceding the said 30th of June and 31st of December, in respect of passengers, goods, and other things carried or landed on the West London Railway, or the lands and appurtenances thereunto belonging, or on or over any alterations and improvements in any of the premises thereby *demised, or in lieu of or by way of substitution for any part
 *257] thereof, and also such a sum of money as should be equivalent to half of the net profits arising from the rates, tolls, and duties to be received for the use of the same respectively from persons providing their own locomotives or other moving power, or carriages; and it was thereby (amongst other things) agreed and declared between and by the said West London Railway Company and the London and Birmingham Railway Company, that the London and Birmingham Railway Company should, within fourteen days after each 30th of June and 31st of December in every year during the continuance of the said lease, cause to be delivered to the secretary or chairman for the time being of the directors of the West London Railway Company, a statement in writing, under the hand of the secretary for the time being of the London and Birmingham Railway Company, of the gross amount of receipts for the previous period of six calendar months, on account of all passengers, goods, and other things carried and landed on any part of the West London Railway, or any railway or works to be made in lieu thereof, or the appurtenances thereto belonging, and on account of any rates, tolls, and duties in respect of the said railway, and other works and improvements in lieu thereof, such statements to be delivered to such chairman or secretary in person, or to be left at the office for the time being of the said West London Railway Company, or at the residence or last known residence in England of such chairman or secretary, or of any person who should last have acted in either of those capacities; and it was by the said indenture further declared and agreed that the rates and tolls payable in respect of passengers, and of parcels and small packages of goods or other things conveyed upon the West Lon-

don Railway, or upon any railway or works to be made in lieu of or substitution for any part thereof, should, as between *the companies parties thereto, be credited and accounted for by the [*258 London and Birmingham Railway Company as follows, that is to say, in respect of passengers, parcels, and small packages, at the rate of 50l. per cent. more than the rates and tolls charged in respect of passengers, parcels, and small packages carried upon the main line of the London and Birmingham Railway for similar distances, and, in respect of goods and other things, at the rate of 50 per cent. per ton per mile, more than the rates and tolls charged in respect of goods and other things carried upon the main line of the London and Birmingham Railway for similar distances, whether such increased rates or tolls should or should not be charged by the London and Birmingham Railway Company in respect of the said passengers, parcels, small packages, goods, and other things conveyed on or along the West London Railway, or any part thereof, or upon any railway or works to be made in lieu of or substitution for any part thereof; and it was thereby further declared and agreed that the money which from time to time should constitute one fourth part of such gross receipts, and half part of such net profits as aforesaid, as the case might be, should, subject to the provisions therein following, and next thereafter mentioned, be paid over by the London and Birmingham Railway Company to the West London Railway Company on the days on which the same should be so carried to their credit as aforesaid; and it was in and by the said indenture provided that the West London Railway Company should discharge all such debts and liabilities as they were or should be subject to, and indemnify the London and Birmingham Railway Company against such debts and liabilities, and against all actions, suits, costs, charges, damages, and expenses in respect of all or any such debts and liabilities; and, in case the London and *Birmingham Railway Company should deem it expedient to [*259 pay any of the debts and liabilities of the West London Railway Company, admitted by the last-mentioned company to be valid and subsisting, or any judgment-debts of the said company not the subject of any proceeding to set such judgments aside, the London and Birmingham Railway Company were to be at liberty to do so, and to apply the rent which they from time to time might be liable to carry to the credit of the West London Railway Company, in or towards the discharge of the debts and liabilities so paid, and the costs, charges, and expenses connected therewith, until the same respectively should be liquidated; and it was thereby further agreed that the London and Birmingham Railway Company should, at their own expense, during the continuance of the said lease, efficiently work and repair the railway and works thereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges and expenses, claims and demands, whether incurred and sustained in consequence of any want of repair,

or in consequence of not working, or in any manner connected with the working of the same railway and works, but that the West London Railway Company were to have no control whatever over the working or management by the London and Birmingham Railway of the West London Railway or works, and that the London and Birmingham Railway Company should and would pay and discharge all rates, taxes, and assessments, and other outgoings which then were, or should or might be, taxed, rated, charged, assessed, or imposed upon the premises thereby demised, or upon any part thereof, but not including rates, taxes, assessments, or outgoings in respect of the Kensington Canal; and it was thereby further declared and agreed, that the West London Railway Company should be entitled to receive from

*260] the London and Birmingham Railway Company one half *of any rents derivable or receivable from the letting of any part of the land thereby demised, for warehouses or otherwise, or from warehouses built on any part of the land thereby demised, by the London and Birmingham Railway Company, and let out by them, after deducting in the latter case $7\frac{1}{2}$ per cent. on the outlay; and the said London and Birmingham Railway Company, for themselves, their successors and assigns, thereby covenanted with the said West London Railway Company, their successors and assigns, that they the said London and Birmingham Railway Company, their successors or assigns, would duly pay or account for to the West London Railway Company, their successors or assigns, the rents or sums of money in the nature of rent, and all other moneys thereby made payable and agreed to be paid by the London and Birmingham Railway Company, and also would observe and perform such of the agreements in the said indenture contained, as on the part of the London and Birmingham Railway Company were or ought to be performed,—as by the said indenture, reference being thereunto had, would, among other things, more fully and at large appear. Averment, that, after the making of the said indenture, and before the commencement of the suit, by an act passed in the session of parliament held in the 9th and 10th years of the reign of Her present Majesty, intituled “An Act to consolidate the London and Birmingham, Grand Junction, and Manchester and Birmingham Railway Companies,” a certain act therein recited for incorporating the said London and Birmingham Railway Company and certain other acts therein also recited relating to the said company, and among others, the said act thereinbefore first recited, were repealed, and the said London and Birmingham Railway Company was thereby dissolved, and a certain other company, to wit, the Grand Junction Railway Company, and the Manchester and

*261] *Birmingham Railway Company, were thereby dissolved, and the several persons and corporations who immediately before the passing of the said act were proprietors of shares and consolidated stock respectively in the respective capitals or joint-stocks of the said thereby dissolved companies, and their executors, administrators, successors,

and assigns respectively, were incorporated into one company, by the name of The London and North Western Railway Company; and it was thereby provided that the repealing of the said acts should not annul or in anywise prejudice or affect any purchase, sale, conveyance, grant, contract, security, act, matter, or thing whatsoever before the passing of the said act made, done, committed, or executed under or by virtue or in pursuance of the said acts thereby repealed, or any of them, but all such purchases, sales, conveyances, grants, contracts, securities, acts, matters, and things were thereby declared to be as good, valid, and effectual to all intents and purposes whatsoever, as if the said acts had not been repealed; and it was by the said last-mentioned act enacted, that, from and immediately after the passing of that act, the aforesaid London and Birmingham, Grand Junction, and Manchester and Birmingham Railways, and all other railways and branches thereof respectively, which were vested in or belonged to the said dissolved companies, or any of them, immediately before the passing of that act, whether under the powers of acts of parliament, or with the consent of landowners, or otherwise, and all works attached thereto, or made or provided for the purposes thereof respectively, together with all stations, embankments, drains, soughs, tunnels, arches, piers, bridges, sluices, gates, ways, roads, landing-places, quays, wharfs, warehouses, houses, and other buildings, cranes, weighing-machines, engines, rails, and appurtenances to the said railways, and to all branches and extensions thereof belonging, and all lands, *tenements, easements, rights, powers, and privileges whatsoever, and the benefit of all contracts, agreements, and proceedings in any way relating thereto, of or to which the said dissolved companies, or any of them, were seised, possessed, or entitled, at law or in equity, immediately before the passing of that act, should be well and effectually vested in and belong to the company thereby incorporated, for their absolute benefit; and it was by the said act further enacted, that, where the companies thereby dissolved, or any of them, were immediately before the passing of that act seised or possessed of, or in anywise entitled to, any railway, branch, work, or hereditament, jointly or in common with any company or companies not thereby dissolved, or with any person or persons, that all such share, right, or interest of and in the same railway, branch, work, or hereditament, as was vested in or belonged to the said dissolved companies, or any of them, should, immediately after the passing of the said act, be well and efficiently vested in and belong to the London and North Western Railway Company, in such manner and quality of estate or interest, and subject to such obligations in respect of the joint or common ownership thereof, as the said dissolved companies, or any of them, would have held and been subject to in case the said act had not been passed; and it was thereby further enacted, that, from and immediately after the passing of the said act, all the moneys, goods, chattels;

steam and other engines, carriages, wagons, trucks, machines, ropes, live and dead stock, shares, bonds, deeds, securities, books, writings, maps, plans, and other personal estate and effects of or to which the said dissolved companies, or any of them, were possessed or entitled, at law or in equity, immediately before the passing of the said act, should be vested in and belong to the company thereby incorporated, for their absolute benefit, and all persons and corporations who

***263]** *immediately before the passing of the said act owed any sum of money to the said dissolved companies, or to any of them, or to any person on behalf of the said dissolved companies, or any of them, should pay the same, together with all interest, if any, due or to accrue due for the same, to the company thereby incorporated, and all moneys which immediately before the passing of the said act were due or owing by, or recoverable from, the said dissolved companies, or any of them, or for the payment of which they or any of them were, or, but for the passing of the said act, would have been, liable, should be paid, with all interest, if any, due or to accrue due thereon, by, or be recoverable from, the company thereby incorporated, and all conveyances, contracts, agreements, mortgages, bonds, covenants, and securities made or entered into before the passing of the said act, to, with, or in favour of, or by or for the said dissolved companies, or any of them, or any person on behalf of the said dissolved companies, or any of them, should be and remain as good, valid, and effectual in favour of, against, and with reference to, the company thereby incorporated, and might be proceeded on and enforced in the same manner to all intents and purposes, as if the same company had been a party to and executed the same, or had been named or referred to therein, instead of the persons, company, or party actually named therein respectively: That the said last-mentioned act was passed on the 16th of July, 1846: That, after the making of the said indenture, to wit, on the day of the making thereof, the said London and Birmingham Railway Company entered into and upon the said demised premises under and by virtue of the said grant and lease and demise thereof, and then became and were possessed thereof, and continued so possessed thereof from thence until the dissolution of the same company as aforesaid; and that

***264]** the said London and North Western Railway Company, *from the said dissolution hitherto, had been and still were possessed of the said demised premises, with the appurtenances, under and by virtue of the said grant, lease, and demise thereof, and of the said act of parliament last therein before mentioned and recited: That, although, from time to time, and at divers times after the making of the said indenture, and within the several periods of six calendar months respectively next immediately preceding the 30th of June, 1846, and respectively next immediately preceding each 31st of December and 30th of June after the said 30th of June, 1846, and before

the commencement of this suit, the said London and Birmingham Railway Company before the dissolution thereof as aforesaid, and the said London and North Western Railway Company since the said dissolution and before the commencement of this suit, did receive divers large sums of money in respect of passengers, goods, and other things carried and landed on the said West London Railway, and the lands and appurtenances thereto belonging, amounting to a large sum, to wit, 20,000*l.*, and that a sum equivalent to one-fourth part of the moneys so received ought to have been carried to the credit of the said West London Railway Company, at the several times and in the manner in the said indenture specified and provided; and although twenty-one days after each 30th of June aforesaid, and after each 31st of December aforesaid, elapsed before the commencement of this suit, yet neither the said London and Birmingham Railway Company before the dissolution thereof as aforesaid, nor the said London and North Western Railway Company since the said dissolution, did or would, within the said respective periods of twenty-one days, and which elapsed after the making of the said indenture, and before the commencement of this suit, or at any time or times whatever, carry to the credit of the said West London Railway Company [*265
*such a sum of money as was equivalent to one fourth part of the gross sums so received by them respectively as aforesaid during the respective periods of six calendar months next immediately preceding each such 30th of June and 31st of December respectively, or any part of such sum, but wholly made default therein, contrary to the said covenant of the said London and North Western Railway Company in that behalf: That, although, from time to time after the making of the said indenture, and within the several periods of six calendar months respectively next immediately preceding the 30th of June, 1846, and each 31st of December and 30th of June after the said 30th of June, 1846, and before the commencement of this suit, the said London and Birmingham Railway Company before the dissolution thereof as aforesaid, and the said London and North Western Railway Company after such dissolution, and before the commencement of this suit, did receive divers large sums of money for and in respect of rates, tolls, and duties for the use of the said railway and appurtenances, from persons providing their own locomotive or other moving power, or carriages, and, during those periods respectively, the net profits arising from such tolls, rates, and duties derived to and earned by the said London and Birmingham Railway Company before the dissolution thereof, and the said London and North Western Railway Company since the said dissolution, amounted to a large sum, to wit, the sum of 1000*l.* in each of such periods, and the period of twenty-one days after each such 30th of June aforesaid, and each such 31st of December aforesaid, elapsed before the commencement of this suit; yet the said London and Birmingham

Railway Company before the said dissolution thereof, and the said London and North Western Railway Company since the said dissolution, did not nor would within the said respective periods of twenty-one days, *266] and which elapsed *after the making of the said indenture and before the commencement of this suit, or at any time or times, carry to the credit of the said West London Railway Company such a sum of money as was equivalent to one-half of the said net profits so arising from the said rates, tolls, and duties as aforesaid, or any part of such sum, but therein wholly made default, contrary to the covenant of the said London and Birmingham Railway Company in that behalf: That, although, from time to time, and at divers times after the making of the said indenture, and before the commencement of this suit, and within the several periods of six calendar months next before each 30th of June and 31st of December in every year during the continuance of the said lease, the said London and Birmingham Railway Company before the dissolution thereof as aforesaid, and the said London and North Western Railway Company since the dissolution, and before the commencement of this suit, did receive divers large sums of money on account of passengers, goods, and other things carried and landed on the said West London Railway and the appurtenances thereto belonging, and also divers large sums of money on account of rates, tolls, and duties for the use of the said railway and appurtenances, from persons providing their own locomotive and other moving power, or carriages, and fourteen days after each of the said days also elapsed before the commencement of this suit; yet the said London and Birmingham Railway Company before the said dissolution thereof, nor the said London and North Western Railway Company since such dissolution, did not nor would at any time within fourteen days after each such 30th of June and each such 31st of December aforesaid, and which elapsed after the making of the said indenture and before the commencement of this suit, or at any other time or times, deliver, or cause to be delivered, in the manner by the said indenture in that behalf provided, *267] *to the secretary or chairman for the time being of the directors of the said West London Railway Company, any statement in writing, under the hand of the secretary for the time being of the said London and Birmingham Railway Company before its dissolution, or of the said London and North Western Railway Company since such dissolution, of the gross amount of such last-mentioned receipts for and during the respective periods of six calendar months next preceding such days, to wit, each such 30th of June and each such 31st of December respectively, but therein wholly made default, contrary to the said covenant of the said London and Birmingham Railway Company in that behalf: That, although the plaintiffs had always discharged all debts and liabilities which they were subject to, and had indemnified the said London and Birmingham Railway Company before the said

dissolution thereof, and the defendants since the said dissolution hitherto, against all such debts and liabilities, and against all such actions; suits, costs, charges, damages, and expenses in respect of all or any such debts and liabilities; and although neither the said London and Birmingham Railway Company before the said dissolution, or the said London and North Western Railway Company since the said dissolution, had paid any debts or liabilities of the plaintiffs, or satisfied any judgments against the plaintiffs, or any costs, charges, or expenses connected with any such debt, liability, or judgment, or had applied any rent which they or either of them were otherwise from time to time liable to carry to the credit of the plaintiffs, in or towards discharge of any such debts or liabilities so paid, or the costs, charges, or expenses connected therewith; and although the said London and North Western Railway Company since the said dissolution had from time to time, and on divers days since the said dissolution, and before the commencement of this suit, carried to the credit of the said West *London Rail- [*268 way Company divers sums of money which respectively constituted one-fourth part of the gross amount of receipts for the respective periods of six calendar months before the 30th of June and the 31st of December in each year since the said dissolution and before the commencement of this suit, on account of passengers, goods, and other things carried over and landed on any part of the said West London Railway, and the appurtenances thereto belonging, and sums constituting one-half of the net profits arising from the rates, tolls, and duties received for the use of the same respectively from persons providing their own locomotive or other moving power, or carriages; yet the said London and North Western Railway Company did not nor would, on the said days respectively on which the said sums respectively were so carried to the credit of the said West London Railway Company, or at any time before or since, pay over to the said West London Railway Company the said moneys respectively, or either of them, or any part thereof, but had therein wholly failed and made default, contrary to the said covenant of the said London and Birmingham Railway Company in that behalf: That, although from time to time, and on divers days and times after the dissolution of the said London and Birmingham Railway Company, and before the commencement of this suit, the said London and North Western Railway Company let and demised certain portions of the land by the said indenture demised, for warehouses and otherwise, such warehouses not being warehouses built on any part of the said land thereby demised, by the said London and Birmingham Railway Company, or by the said London and North Western Railway Company, and derived and received from such lettings respectively, divers rents, amounting in the whole to 1000*l.*; yet the said London and North Western Railway Company had not paid to the said West London Railway

*269] *Company one half of such rents, or any money whatever for or in respect of such rents, but had therein wholly made default, contrary to the covenant of the said London and Birmingham Railway Company in that behalf: That the said London and Birmingham Railway Company before the said dissolution, and the said London and North Western Railway Company since the said dissolution and before the commencement of this suit, *did not* nor would, at their own expense, *efficiently work the said railway and works so as aforesaid demised*, or any of them, and, from the time of the making of the said indenture, the said London and Birmingham Railway Company before the said dissolution, and the said London and North Western Railway Company ever since until the commencement of this suit, had refused and wholly neglected so to do, and thereby the said West London Railway Company were damaged, and sustained loss by reason of there not being carried to their credit and paid to them divers sums and proportions of receipts and profits, to wit, one fourth part of gross receipts as aforesaid, and half of such net profits as aforesaid, to which sums and proportions of receipts and profits, amounting, to wit, to 20,000*l.*, the said West London Railway Company would, but for the premises in that breach mentioned, have been entitled, under the provisions of the said indenture, to have had carried to their credit and paid over to them from time to time before the commencement of this suit, and which had never been carried to their credit or paid to them, and which they had, by reason of the premises, lost, and against which loss, or any part thereof, the said London and Birmingham Railway Company, or the defendants, had never indemnified the plaintiffs, contrary to the covenant of the said London and Birmingham Railway Company, in that behalf: And that, by reason of the premises aforesaid, the said West London Railway Company had sustained great *loss, and had been damnified, to

*270] wit, to the amount of 20,000*l.*, wherefore the said West London Railway Company said that the said London and Birmingham Railway Company and the said London and North Western Railway Company respectively had not kept the said several covenants of the said London and Birmingham Railway Company in the said indenture contained, but had therein respectively made default, &c.

The defendants, after setting out the indenture upon oyer, demurred specially to the first, second, and fourth breaches (letting judgment go by default as to the third and fifth breaches); and, as to the sixth breach, pleaded, that the said London and Birmingham Railway Company, from the time of the making of the said indenture until the said dissolution, at their own expense, and the defendants from the time of such dissolution to the commencement of this suit, at their own expense, *did efficiently work the said railway and works* according to the said covenant in that behalf,—concluding to the country. Issue thereon.

The indenture, as set out upon oyer, was as follows: “This indenture,

made the 10th day of March, 1846, between the West London Railway Company of the one part, and the London and Birmingham Railway Company of the other part: Whereas, an act was passed in the 9th year of the reign of Queen Victoria, intituled 'An act for enabling the London and Birmingham Railway Company to take a lease of the West London Railway,' whereby it was enacted that it should be lawful for the West London Railway Company, by and with the consent of a general meeting of the proprietors of the company, specially convened for the purpose, to demise or lease to the London and Birmingham Railway Company, for any term not exceeding nine hundred and ninety-nine years, the West London Railway, as authorized to be constructed under the powers of their acts, *which are severally recited in the act now in recital, and all [*271 stations, wharfs, lands, buildings, and appurtenances belonging thereto, or held, used, or enjoyed therewith, and all their rights, powers, and privileges in relation thereto; and that it should be lawful for the London and Birmingham Railway Company to accept and take such lease, and to use, exercise, and enjoy all such powers, rights, and privileges as aforesaid, subject to the provisions of the act now in recital, and to the performance of the conditions to be contained in such lease; and it was enacted that any agreement which might have theretofore been entered into between the said two companies with reference to the granting or acceptance of any such lease, or the terms or conditions thereof, should, if the same were consistent with the provisions of the act now in recital, be as valid and binding on the said two companies respectively as though the same had been entered into under the provisions of the act now recited: And whereas, at a special general meeting of the proprietors of the West London Railway Company, held at their offices in Abchurch Lane, on the 3d of September now last, a resolution was passed whereby such general meeting of proprietors consented to the West London Railway, with the appurtenances, being demised in manner hereinafter expressed: Now, this indenture witnesseth, that, in consideration of 60,000*l.* paid by the London and Birmingham Railway Company to or on account of the West London Railway Company, upon or before the execution of these presents, as the West London Railway Company do hereby acknowledge, and of and from the same, and every part thereof, do acquit, release, and discharge the London and Birmingham Railway Company, their successors and assigns; and also in consideration of the yearly rents or sums of money, covenants, and conditions hereinafter respectively reserved and contained, and by the London and Birmingham Railway *Company, their successors [*272 and assigns, to be respectively paid or accounted for, observed, and performed, the West London Railway Company, in pursuance of the power hereinbefore recited, and of every other power hereunto enabling them, do grant, demise, and lease unto the London and Birmingham Railway Company, the West London Railway, as authorized

to be constructed under the powers of the said acts recited in the said recited act, and all stations, wharfs, buildings, and appurtenances thereto belonging, or held, used, or enjoyed therewith, and the rates and tolls payable in respect thereof, *together with all the rights, powers, and privileges of the West London Railway Company in relation thereto*; and also all that piece or parcel of land situate and being on the north and west sides of the basin of the Kensington Canal, in the parish of St. Mary Abbots, Kensington, in the county of Middlesex, and purchased by the West London Railway Company from the Kensington Canal Company, with all ways, rights, and appurtenances to the last-mentioned premises belonging; and the rails, erections, wharfs, and other conveniences on such last-mentioned land (subject to the provision respecting the use and enjoyment of such last-mentioned land, and the rails, erections, and conveniences thereon, by the West London Railway Company, hereinafter contained); and also all those the several pieces or parcels of land belonging and adjoining, or situate near, the said West London Railway, and purchased by the said West London Railway Company, and now used or required for the purpose thereof; all which said railway, lands, and hereditaments hereby demised, are more particularly described in the map or plan annexed to these presents, the same being coloured red; and also the free and uninterrupted use of the Kensington Canal for the purposes of the traffic of the London and Birmingham Railway Company on the West London Railway, *273] **(subject to the payment of such rates and tolls as hereinafter mentioned with respect to the use of the said canal)*; and also such right of drainage as the West London Railway Company lawfully can or may grant, into the said canal, for the purposes of the West London Railway, and also of any new line of railway which may be formed for the purpose of extending the West London Railway to the river Thames,—To have, hold, exercise, and enjoy the railway and other works, lands, and premises hereby granted and demised, or intended so to be, and the said powers and privileges hereby granted and demised (subject as aforesaid), unto and by the London and Birmingham Railway Company, their successors and assigns, free from all encumbrances, for the term of nine hundred and ninety-nine years, to be computed from the 11th of March, 1845, subject to the London and Birmingham Railway Company, their successors or assigns, accounting for or paying, as the case may be, under the provisions hereinafter contained, to the West London Railway Company, their successors or assigns, during the said term, such annual or other sum or sums of money as under the provisions hereinafter contained shall for the time being be payable: And it is agreed, that, during the continuance of this lease, the London and Birmingham Railway Company shall, within twenty-one days after the 30th of June and the 31st of December in every year, carry to the credit of the West London Railway Company

such a sum of money as shall be equivalent to one fourth part of the gross sums received by the London and Birmingham Railway Company during the period of six calendar months next immediately preceding the said 30th of June and the 31st of December, in respect of passengers, goods, and other things carried or landed on the West London Railway, or the lands and appurtenances thereto belonging, or on or over any alterations or improvements in any of the premises hereby demised, *or in lieu of, or by way of substitution for, any part thereof, and also such sum of money as shall be equivalent to [*274 one-half of the net profits arising from the rates, tolls, and duties to be received for the use of the same respectively from persons providing their own locomotive or other moving power, or carriages: And it is hereby agreed and declared between and by the companies parties hereto, as follows,—that the London and Birmingham Railway Company shall, within fourteen days after each 30th of June and 31st of December in every year during the continuance of this lease, cause to be delivered to the secretary or chairman for the time being of the directors of the West London Railway Company a statement in writing under the hand of the secretary for the time being of the London and Birmingham Railway Company of the gross amount of the receipts for the previous period of six calendar months on account of all passengers, goods, and other things carried or landed on any part of the West London Railway, or any railway or works to be made in lieu thereof, or the appurtenances thereunto belonging, and on account of any rates, tolls, and duties in respect of the said railway and other works and improvements in lieu thereof, such statement to be delivered to such chairman or secretary in person, or left at the office for the time being of the West London Railway Company, or at the residence, or last-known residence in England of such chairman or secretary, or of any person who shall last have acted in either of those capacities;—that the rates and tolls payable in respect of passengers, and of parcels and small packages, and goods, and other things conveyed upon the West London Railway, or upon any railway or works to be made in lieu of or substitution for any part thereof, shall, as between the companies parties hereto, be credited and accounted for by the London and Birmingham Railway Company as follows, that is to say, in respect of *passengers, parcels, and small packages, at the rate of 50 per [*275 cent. more than the rates and tolls charged in respect of passengers, parcels, and small packages carried upon the main line of the London and Birmingham Railway for similar distances, and, in respect of goods and other things, at the rate of 50 per cent. per ton per mile more than the rates and tolls charged in respect of goods and other things carried upon the main line of the London and Birmingham Railway for similar distances, whether such increased rates or tolls shall or shall not be charged by the London and Birmingham Railway Company

in respect of the said passengers, parcels, small packages, goods, and other things conveyed on or along the West London Railway, or any part thereof, or upon any railway or works to be made in lieu of or substitution for any part thereof; and, further, that the London and Birmingham Railway Company shall and will, upon the written request of the directors for the time being of the West London Railway Company, or any two of them, verify such statement, by showing, at the office of the London and Birmingham Railway Company, to the secretary for the time being of the West London Railway Company, or such other person as may from time to time be named for that purpose by the said directors, or any two of them, and allowing to such secretary or other person full and uninterrupted examination of the books of account from which the several particulars aforesaid shall have been taken: that the money which from time to time shall constitute one-fourth part of such gross receipts, and one-half of such net profits, as aforesaid, as the case may be, shall, subject to the provisions following, be paid over by the London and Birmingham Railway Company to the West London Railway Company, on the days on which the same shall be so carried to their credit as aforesaid: that the West London Railway Company

*276] *shall discharge all such debts and liabilities as they are or shall be subject to, and indemnify the London and Birmingham Railway Company against such debts and liabilities, and against all actions, suits, costs, charges, damages, and expenses in respect of all or any such debts and liabilities; and, in case the London and Birmingham Railway Company shall deem it expedient to pay any of the debts and liabilities of the West London Railway Company, admitted by the last-mentioned company to be valid and subsisting, or any judgment-debts of the said company not the subject of any proceeding to set such proceedings aside, the London and Birmingham Railway Company shall be at liberty so to do, and to apply the rent which they from time to time shall be liable to carry to the credit of the West London Railway Company in or towards discharge of the debts and liabilities so paid, and the costs, charges, and expenses connected therewith, until the same respectively shall be liquidated: that the London and Birmingham Railway Company shall, at their own expense, during the continuance of this lease, *efficiently work and repair the railway and works hereby demised*, and indemnify the West London Railway Company against all liabilities, loss, charges and expenses, claims and demands whatsoever, incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway and works; but the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham Railway Company of the West London Railway or works; and that the London and Birmingham Railway Company shall and will pay and discharge all rates, taxes, assessments, and other outgoings

which now are, or shall or may be, taxed, rated, charged, assessed, or imposed upon the premises hereby demised, or upon any part thereof, but not *including rates, taxes, assessments, or outgoings in respect of the Kensington Canal: that, in the event of the London and Birmingham Railway Company making any alterations or improvements in the railway, or the works connected therewith, hereby demised, or any additional, new, or other railway or works in lieu of or in substitution for all or any part of those included in this demise, the costs of such alterations, improvements, or additional, new, or other railway or works, shall be paid exclusively by the London and Birmingham Railway Company, but the West London Railway Company shall have the same shares and interests in the rates, tolls, and duties payable for the transport of passengers, goods, and other things over or along such altered, improved, additional, new, or other railway or works, and such rates, tolls, and duties shall respectively receive the same augmentation of 50 per cent. as if such altered, improved, additional, new, or other railway or works had formed part of the premises hereby demised: that the West London Railway Company shall be entitled to receive from the London and Birmingham Railway Company one-half of any rents derivable or receivable from the letting of any part of the land hereby demised, for warehouses or otherwise, or from warehouses built on any part of the land hereby demised, by the London and Birmingham Railway Company, and let out by them, after deducting, in the latter case, 7½ per cent. on the outlay: that the West London Railway Company shall have the free, gratuitous, and uninterrupted use of the land on the west and north sides of the Kensington Canal Basin hereinbefore described as purchased by them from the Kensington Canal Company, and to receive for their own use the sums of money from time to time payable for the wharfage of goods thereon (except upon such goods or merchandises as shall be conveyed upon the West London Railway, or upon any railway or works to be made *in lieu or substitution thereof), and also the free, gratuitous, and uninterrupted use of the rails, erections, or other conveniences on such land, for all purposes connected with or necessary to the shipment and landing of goods to and from the said basin, and otherwise in the necessary use of the said canal and basin, and also for the use and enjoyment of the adjoining land of the West London Railway Company: that the rates and tolls to be paid by the London and Birmingham Railway Company in respect of the free and uninterrupted use of the Kensington Canal for the purposes of their traffic as hereinbefore expressed, shall be such reasonable rates and tolls as shall be agreed upon between the said companies, or, in case of dispute, be fixed, on the application of either of such companies, by the board of trade, or some person to be appointed by them; and such rates and tolls shall be carried to the credit of the West London Railway Company, at the same times as other moneys ought pur-

suant to this agreement to be carried to their credit : And the London and Birmingham Railway Company, for themselves, their successors and assigns, hereby covenant with the West London Railway Company, their successors and assigns, that they the said London and Birmingham Railway Company, their successors and assigns, will duly pay or account for to the West London Railway Company, their successors or assigns, the rents, or sums of money in the nature of rent, and all other moneys hereby made payable, and agreed to be paid by the London and Birmingham Railway Company, and will also observe and perform such of the agreements hereinbefore contained as on the part of the London and Birmingham Railway Company are or ought to be performed : And the West London Railway Company, for themselves, their successors and assigns, hereby covenant with the London and Birmingham Railway Company, their successors and assigns, that the West London

*279] Railway Company, their successors and assigns, will duly observe and perform such of the agreements hereinbefore contained as on the part of the West London Railway Company are or ought to be performed ; and, further, that, the London and Birmingham Railway Company paying and accounting for the said rents, or sums of money in the nature of rent, and other moneys hereby made payable and agreed to be paid by them, it shall be lawful for them peaceably to enter upon, hold, occupy, receive, exercise, and enjoy the railway, works, lands, tenements, tolls, rates, powers, privileges, and other the premises hereby granted and demised, or intended so to be, for their own use and benefit for and during the term hereinbefore specified, subject nevertheless to the agreements hereinbefore contained, without any let, suit, trouble, denial, interruption, or disturbance of or by the West London Railway Company, or any other company, or any person or persons ; and that free from, or by the West London Railway Company, their successors or assigns, kept indemnified from and against, all former and other estates, rights, titles, charges, and encumbrances, created or occasioned by the West London Railway Company, or any other company, or any person or persons : and also that the West London Railway Company, their successors and assigns, and all persons having or rightfully claiming, or who shall or may have or rightfully claim, any estate, right, title, or interest to or in the premises hereby demised, or any of them, will at any time or times, at the request and costs of the London and Birmingham Railway Company, make, do, or execute every such act, deed, or assurance for more effectually demising the railway, works, and premises hereby demised, or intended so to be, or any part thereof, unto the said London and Birmingham Railway Company, their successors and assigns, for the residue which shall be then unexpired of the said term of nine hundred and ninety-nine years expressed to

*280] be hereby granted therein, according to the true intent and meaning of these presents, as by the London and Birmingham

Railway Company, their successors and assigns, or their or any of their counsel, shall be reasonably advised and required, and as shall be tendered to be done or executed. In witness," &c.

The cause was tried before JERVIS, C. J., at the sittings in London after last Hilary term. The facts were as follows:—

A company called the Kensington Canal Company was in the year 1824 incorporated by an act of 5 G. 4, c. lxxv., amended by 7 G. 4, c. xcvi., "for widening, deepening, enlarging, and making navigable a certain creek called Counter's Creek, from or near Counter's Bridge, on the road from London to Hammersmith, to the river Thames, in the county of Middlesex, and for maintaining the same."

In the year 1834, the now Great Western Railway Company applied (unsuccessfully) to parliament for an act to empower them to make a railway from London to Reading, and from Bath to Bristol. At that time it was proposed by the projected company that their London terminus for passenger traffic should be at Brompton, and for goods traffic at the basin of the Kensington Canal. This scheme was abandoned; and in 1835, the Great Western Railway Company obtained their act of incorporation, 5 & 6 W. 4, c. cvii., by which they were empowered to make their railway, not to the present terminus at Paddington, but terminating by a junction with the London and Birmingham Railway in a field between the Paddington Canal and the turnpike-road leading from London to Harrow, near a place called Holsden or Harlesden Green,—the intention of both the Great Western and the London and Birmingham companies (the latter of whom had previously obtained their act of incorporation, 3 & 4 W. 4, c. xxxvi.) being at that time to *have but one line from the point of junction, and [*281 to have their London stations in common.

In the year 1836, the plaintiffs obtained their act of incorporation, 6 W. 4, c. lxxix., intituled "An act for making a railway from the basin of the Kensington Canal, at Kensington, to join the London and Birmingham and Great Western railways at or near Holsden Green, in the county of Middlesex, and to be called The Birmingham, Bristol, and Thames Junction Railway." By this act, the company were empowered to purchase the Kensington Canal for 36,000*l.*, of which sum 10,000*l.* was to be paid in cash, and 26,000*l.* by shares to that amount in the railway, to be subscribed for by the proprietors of the canal; and the proprietors of the canal and railway were empowered to raise amongst themselves, for the purposes of the undertaking (including the purchase-money for the canal), 150,000*l.*, in shares of 20*l.* each, and, if necessary, 50,000*l.* additional, by mortgage. And by s. 5, they were empowered to make the railway from the point of junction of the London and Birmingham and the Great Western railways, or at near Holsden Green, to the basin of the Kensington Canal.

In 1837, the Great Western Railway Company being desirous of

VOL. XI.—26

extending their line to their present terminus at Paddington,—which could only be done by crossing the plaintiffs' railway on a level, and almost at right angles,—an agreement was entered into between them, on the 4th of February, in that year, whereby,—after reciting a conveyance by the Bishop of London, as lord of the manor of Fulham, of certain lands to the plaintiffs, by their then name of The Birmingham, Bristol, and Thames Junction Railway Company,—and further reciting that “the said Birmingham, Bristol, and Thames Junction Railway Company intend and are proceeding to construct their railway over, under, or across the piece or parcel of land conveyed to them as afore-
 *282] said,—that *the said Great Western Railway Company intend to make and construct a railway, to commence at or near a point in their railway in the parish of Acton, in the county of Middlesex, and to terminate at or near the basin of the Grand Junction Canal, in the parish of Paddington, and they intend to apply to parliament, in the next session thereof, for an act of parliament conferring on them various powers and privileges in regard to their said intended railway, and it is proposed that such intended railway shall pass over or across the said piece or parcel of land so as aforesaid conveyed to the said Birmingham, Bristol, and Thames Junction Railway Company [at a point indicated on the plan in the margin of the agreement], where the said intended railways will intersect or cross each other,—that the said Birmingham, Bristol, and Thames Junction Railway Company intend to continue their railway from or near the basin of the Kensington Canal, in the said parish of Kensington, to Kingsbridge Green, in the parish of St. Margaret, Westminster, and they intend to apply to parliament, in the next session thereof, for an act of parliament conferring upon them powers and privileges for that purpose,—that the said respective companies were lately opposed to each other in regard to carrying the said railways so intended to be made by them respectively as aforesaid, over, under, or across the said piece or parcel of land so conveyed to the said Birmingham, Bristol, and Thames Junction Railway Company as aforesaid, and the said last-mentioned company having contracted for the purchase of the premises described, at a price agreed upon pursuant to the provisions of the said act of parliament,(a) and the said Birmingham, Bristol, and Thames Junction Railway Company having tendered the purchase-money as agreed upon for the same, and the churchwardens of
 *283] *the parish of Hammersmith, having received a notice from the said Great Western Railway Company not to receive the said purchase-money, refused to receive the same, and, in consequence thereof, the said purchase was not completed,—that, in order to put an end to such opposition between the said respective companies, and to put an end to all disputes between them in regard to their respect-

ively carrying their said intended railways over, under, or across the said last-mentioned piece or parcel of land, it was lately arranged and agreed between them that the said Great Western Railway Company should withdraw the notice so given by them to the churchwardens of the parish of Hammersmith, and that the said Birmingham, Bristol, and Thames Junction Railway should take a conveyance of the said hereinbefore mentioned piece or parcel of land, and that the said last-mentioned company should give and grant unto the said Great Western Railway Company the rights, powers, privileges, and authorities hereinafter given and granted to them, and that the said companies should respectively enter into and make the covenants and agreements on their respective parts hereinafter contained,—and that, in pursuance of such arrangement and agreement, and on the faith thereof, the said hereinbefore-recited deed or instrument of conveyance hath been executed by the said bishop, with the privity and assent of the said Great Western Railway Company,”—the indenture witnessed, “that, in further pursuance of the said agreement or arrangement, and in consideration of the premises, the said Great Western Railway Company, so far as relates to the observance and performance by them of the covenants and agreements hereinafter contained, do, for themselves and their successors, grant, covenant, and agree with and to the said Birmingham, Bristol, and Thames Junction Railway Company, and their successors, and the said Birmingham, Bristol, and Thames Junction Railway *Company, so far as relates to the observance and performance [*284 by them of the covenants and agreements hereinafter contained, do, for themselves and their successors, grant, covenant, and agree to and with the said Great Western Railway Company and their successors, in manner following, that is to say, that the ownership of the soil of the pieces of land so as aforesaid conveyed to the said Birmingham, Bristol, and Thames Junction Railway Company, and upon, over, under, or across which a railway shall be made by the said Great Western Railway Company, shall be and remain vested in the said Birmingham, Bristol, and Thames Junction Railway Company, subject to the powers and covenants hereby granted or agreed to be granted to the said Great Western Railway; and that it shall and may be lawful to and for the said Great Western Railway, at any time or times hereafter, when and as often as they shall think fit after the passing of the act so intended to be applied for by them, to make and construct a railway not exceeding ten yards in breadth (being a portion of the longer line of railway so intended to be made by them) upon, over, under, or across the said piece or parcel of land so as aforesaid conveyed to the said Birmingham, Bristol, and Thames Junction Railway Company, and delineated in the plan drawn in the margin of these presents, and from time to time and at all times hereafter to alter, maintain, and keep in repair and use such railway or portion of railway, at the free will and pleasure of the Great West-

ern Railway Company, and as they shall think fit (subject, nevertheless, as hereinafter mentioned); and also that it shall and may be lawful to and for the said Great Western Railway Company, and their successors, and their agents, servants, and workmen, and all other persons by their authority, from time to time, and at all times hereafter, for the purpose of making, maintaining, altering, repairing, or using such railway or *285] *portion of railway, to bore, dig, make embankments or cuttings, and lay, use, and manufacture any materials, and execute any works whatsoever, in or upon the same piece or parcel of land, or any part thereof, as the said last-mentioned company shall think fit, subject, nevertheless, as hereinafter mentioned; and also that it shall and may be lawful to and for the said Great Western Railway Company, their agents, servants, and workmen, and their engines and carriages, authorized in that behalf by the said Great Western Railway Company, from time to time, and at all times, at the pleasure of the said Great Western Railway Company, to go, pass, and repass upon or along, and use, the said piece or parcel of land, and the railway or portion of railway authorized to be made and constructed therein as aforesaid, without any hindrance, obstruction, interruption, or denial by or on the part of the said Birmingham, Bristol, and Thames Junction Railway Company, or their successors, or any person or persons by their authority, without any toll or compensation whatsoever being required by or on behalf of the last-mentioned company, or their successors, but subject, nevertheless, to the provisions and agreements hereinafter expressed and contained; and also that the railway so intended to be made by the said Great Western Railway Company, and the railway so intended to be made by the said Birmingham, Bristol, and Thames Junction Railway Company, shall intersect and cross each other on a level, unless the said parties hereto shall mutually otherwise agree and determine; and also that the following arrangements, which have been determined and approved of by the respective engineers of the said respective parties hereto, in regard to the course or line of the said intended railway of the Great Western Railway Company, the intersection of the railways, and the level of the rails thereof, and the nature of such rails, *286] and the crossing of carriages passing on the said railways *respectively, and the expenses in regard thereto, shall be observed, followed, and performed by the said respective parties hereto, as follows, viz.

“1. The central line of the Great Western Railway to be two hundred and eighty feet south, measuring in the direction of the centre line of the Birmingham, Bristol, and Thames Junction Railway, of a pole now fixed at the corner of the Paddington Canal Bridge, or, if it be found impracticable to attain this distance, on account of the necessity of keeping within eighty yards of the present towing-path of the canal, then the additional expense of constructing the canal, aqueducts,

and the wing walls, so as to admit of the introduction of a double siding on the north of the Great Western Railway, shall be borne by the latter company; the levels of the upper surface of the rails at the points of crossing, to be twenty-one feet below the top water-level of the canal; and, if the canal company will consent to a less depth of water, or less thickness in the crown of the arch, such difference to be deducted from the aforesaid height of twenty-one feet.

“2. The rails, in crossing each other, to be notched, to allow the passage of the flanges, such notches not to be wider than absolutely necessary; or such other mode to be adopted as may be agreed upon between the two engineers.

“3. That the sidings, rails, switches, and other apparatus and machinery at the crossing and station, shall be kept in repair by and at the expense of the Great Western Railway Company: the additional expense incurred by the arrangements necessary for passing the ropes or other machinery for working the inclined plane of the Birmingham, Bristol, and Thames Junction Railway under the rails of the Great Western Railway, shall be borne by the said Great Western Railway Company.

“4. That the Great Western Railway Company shall, *at their own respective expense, construct and maintain a station or [*287 stopping-place in the south-eastern angle formed by the two railways at the point of junction, for the purpose of transferring passengers and goods to and from the said railway respectively; and that a time-piece shall be fixed, and at all times maintained, by and at the expense of the said company, in front of the gallery of the Birmingham, Bristol, and Thames Junction Railway, which time-piece shall be under the joint regulation of the officers of the two companies at the time of crossing.

“5. That, within one week after the Thames Junction Railway shall have given notice to the Great Western Railway Company of their line being completed, and of their intention to open the same for public use, the said Great Western Railway Company shall deliver at the office of the Thames Junction Railway Company a notice in writing, stating the periods at which their regular trains, both going to and coming from London, are intended to arrive at the said station; and if, at any time after such notice shall be given, any alteration be intended to be made in the number of such trains, or the periods at which they are respectively intended to arrive at the said station, then one clear week's notice of such alteration shall be delivered by the said Great Western Railway Company to the said Thames Junction Railway Company, at their office; and, in case of any default in giving any such notice as above required, the said Great Western Railway Company shall forfeit and pay 5*l.*, or, if they shall neglect or refuse to give any such notice as above required, after demand thereof duly made by the said Thames Junction Railway Company, then the Great Western Railway Company

shall forfeit and pay 10*l.* for every day during which such notice shall be withheld, or neglected to be given.

*288] “6. That, after the receipt by the Thames Junction *Railway Company of any such notice as aforesaid, they shall deliver at the office of the Great Western Railway Company four clear days’ notice in writing, stating how many and which of their trains, both to and from London, shall meet those of the Great Western Railway Company at the station aforesaid, of which they may so have received notice.

“7. That the said Great Western Railway Company shall stop such of their trains as the Thames Junction Railway Company shall have declared, in the manner aforesaid, their intention of meeting by corresponding trains at the said station, for the purpose of taking up and setting down such passengers as may require to be transferred to or from the trains of the said Thames Junction Railway Company, and may be respectively ready for the purpose, whether the aforesaid notice shall or shall not have been given by the said Great Western Railway as aforesaid; and, in default thereof, the said Great Western Railway Company shall pay a penalty to the said Thames Junction Railway Company of 20*l.* each for such omission: Provided always, that, in case no passengers or goods shall be in readiness at the said station to be received by the trains of the Great Western Railway Company, or be required to be transferred from the Great Western Railway, then it shall not be obligatory on the Great Western Railway Company to stop the trains in manner aforesaid.

“8. That the said Thames Junction Railway Company shall cause their trains to meet those of the Great Western Railway Company in every instance whenever they may have given notice of their intention so to do, and at the period mentioned in such notices; and, in default thereof, shall forfeit and pay to the said Great Western Railway Company the sum of 10*l.* for every omission.

*289] “9. The Great Western Railway Company to give, *before the arrival of any of their trains, such signal as may be seen or heard at either end of the inclined-plane of the Birmingham, Bristol, and Thames Junction Railway; that, within one minute after such signal, the Great Western Railway Company shall close the passage of the Thames Junction Railway with a good and substantial barrier, with proper spring buffers, placed at right angles to the line of that railway; and that such barrier should not be closed more than three minutes if any train shall require to ascend the inclined-plane, or more than five minutes if any train shall require to descend,—and of which due notice shall be given by the Thames Junction Railway Company; but such barrier shall not remain closed during such periods of three or five minutes respectively, in case such train or trains as may be expected to pass, shall have passed within and before the expiration of such

period of three or five minutes: Provided always, that, in the event of any train or trains of the Thames Junction Railway Company being on the inclined-plane, whether ascending to or descending from the London and Birmingham Railway, notice by signal shall be given by the said company, and no train of the Great Western Railway Company shall pass the said point of junction during a period of two minutes from the signal being given, unless or until the said train or trains of the Thames Junction Railway Company shall have passed in like manner the point of junction of the two lines.

“10. That, in default by either party in the performance of the said last-mentioned condition, the party so offending shall forfeit and pay to the other party the sum of 5*l.* for each and every default.

“11. That every stoppage of any train shall leave its nearest extremity clear by five yards of any part of the area of the crossings; and either company transgressing this stipulation shall pay to the other 5*l.*

*“12. That all penalties hereinbefore fixed shall be recover- [*290
able as liquidated damages.

“13. That, if the said Birmingham, Bristol, and Thames Junction Railway Company, in order to receive the engines and carriages of the said Great Western Railway, shall lay any rails on their said railway, in addition to the rails which would otherwise be required by them, then and in such case the said Great Western Railway Company shall and will pay to them the said Birmingham, Bristol, and Thames Junction Railway Company, so long as such last-mentioned company shall maintain in good and sufficient repair, or renew, such additional rails, interest at the rate of 5*l.* per cent. per annum on the moneys which may be laid out and expended by the said last-mentioned company in or about the procuring and laying such additional rails, provided that such moneys shall not exceed the sum of 5000*l.*

“It is hereby also further agreed by and between the said parties hereto, that the said Birmingham, Bristol, and Thames Junction Railway Company shall and will give their unqualified parliamentary assent to the passing of an act intended to be applied for by the said Great Western Railway Company for authorizing the making of the railway so intended to be made by them, in such manner as under the standing orders of the Houses of Parliament may be required for the signifying of assents to the passing of railway bills, but subject and without prejudice to the said hereinbefore recited conveyance, and these presents, and the grant and provisions herein contained, and shall not nor will, directly or indirectly, oppose the passing of such act; and also that the said Great Western Railway Company shall and will give their unqualified parliamentary assent, as owners or otherwise, to the passing of the act intended to be applied for by the said Birmingham, Bristol, and Thames Junction Railway, for authorizing the making of

*291] the *extension of their railway, intended to be made by them as aforesaid, but subject and without prejudice to the provisions herein contained, and shall not nor will, directly or indirectly, oppose the passing of such act; and also subject and without prejudice to the remedies, rights, and interests, vested or contingent, of the said Great Western Railway Company, under an agreement, dated the 3d of June, 1835, and made between the Rt. Hon. William, Lord Kensington, of the one part, and R. W. Grenfell, of, &c., C. B. Tripp, of, &c., and R. Bright, of, &c., on behalf of the Great Western Railway Company, of the other part, if any such remedies, rights, or interests shall exist as against the Birmingham, Bristol, and Thames Junction Railway Company; and further, but subject, nevertheless, to the sanction and approbation of parliament, that, if so much of the said intended railway of the said Birmingham, Bristol, and Thames Junction Railway Company as is intended to be carried over the said piece or parcel of land in the margin of these presents, shall not be completed within the space limited for that purpose by the said act for incorporating the said last-mentioned company, or any future act, or if so much of the same railway as is intended to be carried over the said last-mentioned piece or parcel of land shall be abandoned or given up by the said last-mentioned company, or, after the same shall have been completed, shall for the space of three years cease to be used and employed as a railway, then and in such case the same piece or parcel of land, or so much thereof as may be required for the said intended railway of the Great Western Railway Company, or any of the works connected therewith, shall thereupon vest and become and be the absolute property of the said last-mentioned company, upon payment, satisfaction, or compensation for the same, at the same price per acre which may have been paid to

*292] the churchwardens of the said two parishes *of Hammersmith and Fulham, by the Birmingham, Bristol, and Thames Junction Railway Company, in the same or the like manner as any other lands which may be taken and purchased by the said Great Western Railway Company for the purposes of their said intended railway."

By the 9 & 10 Vict. c. cciv., the London and Birmingham, the Grand Junction, and the Manchester and Birmingham railway companies were consolidated, and incorporated by the name of the London and North Western Railway Company: and, by the 1st section of that act, the acts of incorporation of those respective companies were repealed; and it was provided that the repealing of the said acts should not revive any acts or provisions of any acts by the said recited acts repealed, and should not annul or in anywise prejudice or affect any purchase, sale, conveyance, grant, contract, security, act, matter, or thing whatsoever theretofore made, done, committed, or executed under or by virtue or in pursuance of the said repealed acts, or any of them, but all such purchases, sales, &c., should be, and were thereby declared to be, as

good, valid, and effectual, to all intents and purposes whatsoever, as if the said acts had not been repealed: and by s. 5, all the rights, interests, and obligations of the old companies were vested in and transferred to the new company.

In the same session, the defendants obtained an act (9 & 10 Vict. c. ccclxix.), intituled "An act to authorize an improvement of the West London Railway, and the extension thereof to the river Thames." By the 1st section of this act,—reciting the 3 & 4 W. 4, c. xxxvi. (the act of incorporation of the London and Birmingham Railway Company), the 6 W. 4, c. lxxix., and the 3 & 4 Vict. c. cv. (the acts relating to the Birmingham, Bristol, and Thames Junction Railway Company), and the leasing act of 8 & 9 Vict. c. clvi.; and reciting that, *by virtue of such last-mentioned act, the West London Railway "had been [*293 leased in perpetuity to the said London and Birmingham Railway Company," and that, "by the said last-mentioned act, it was also provided that the Great Western Railway Company should be admitted to an equal participation with the said London and Birmingham Railway Company, in the possession, use, and management of the said West London Railway, and the exercise and enjoyment of all powers, rights, and privileges in relation thereto;" and further reciting that "the said West London Railway crosses the Great Western Railway on the level, in a very inconvenient manner, for the purpose of communicating with the London and Birmingham Railway; and it is expedient that a new line of railway should be made for such purpose, crossing the said Great Western by means of a bridge, and joining the present line of the said West London at or near Wormwood Scrubbs; that the benefits of the said railway would be greatly increased if the same were extended to the river Thames; and that the London and Birmingham Railway Company and the Great Western Railway Company were willing so to extend the said railway, if authorized by parliament so to do,"—it was enacted "that the several provisions of the lands clauses consolidation act, 1845, and of the railways clauses consolidation act, 1845, so far as the same might be applicable, and were not inconsistent with the provisions thereafter contained, should be incorporated with and form part of that act, for the purpose of enabling the London and Birmingham Railway Company to make a new line of railway to connect the said West London Railway with the London and Birmingham Railway, and extend the line of the said West London Railway to the river Thames as hereinafter mentioned, and to enable the said last-mentioned company, jointly with the Great Western Railway Company, to maintain and use the said railway, *and also to enable either of the said [*294 companies to purchase and hold lands as thereafter mentioned in connexion with the undertaking by that act authorized." And by s. 7 it is enacted, "that the line of the said railway hereby authorized to be made in extension of the said West London Railway, shall commence

at the terminus of the said railway, at or near the basin of the Kensington Canal, in the parish of St. Mary Abbott, Kensington, in the county of Middlesex, shall pass in or through the said parish, and the parishes of Hammersmith, Chelsea, and Fulham, or one of them, in the same county, and shall terminate at or near the river Thames, in or near the Fulham town meadows, in the parish of Fulham; and it shall be lawful for the said London and Birmingham Railway Company to make and maintain such wharfs, quays, buildings, and shipping places, staiths, warehouses, and other conveniences, in connexion with the said railway, as they may deem necessary for the purposes thereof."

In 1847, an act (10 & 11 Vict. c. xci.) was passed, to enable the Great Western Railway Company to widen the West London Railway, to build a bridge across the Thames, and to continue a line to a junction with the London and South Western Railway, in the parish of St. Mary, Lambeth, in the county of Surrey.

Neither the North Western Railway Company nor the Great Western Railway Company had taken any steps towards the carrying into effect the extensions and improvements of the West London Railway, authorized respectively by the 9 & 10 Vict. c. ccclxix., and the 10 & 11 Vict. c. xci.; and, from the time of the execution of the lease of the 10th of March, 1846, not a single passenger train, nor any train in connexion with either the London and North Western Railway, or the Great Western Railway, had been run upon the West London Railway,—the *295] defendants, the London and North Western *Railway Company having found it more conducive to their own interest, and more productive of profit to them, to work the line with goods trains only.

It was admitted that the West London Railway in the hands of the plaintiffs had been an utter failure. But it was insisted, that, upon the true construction of the leasing act (8 & 9 Vict. c. clvi.), and of the lease made in pursuance thereof, the defendants, the lessees, acquired all the rights which the plaintiffs had under their agreement with the Great Western Railway Company, of the 4th of February, 1837, and were bound to enforce those rights, and to run trains on the West London Railway in connexion with their own line and with the Great Western Railway; and, further, that the defendants were bound to work the line with *passenger* trains as well as with goods trains.

For the defendants it was insisted, that the covenant "efficiently" to work the West London Railway was at most a covenant of indemnity: that all that the defendants were bound to do, was, to work the line in a reasonably efficient manner, and that they performed their covenant by working it in such manner as might be found to be productive of the largest amount of net profits; and that they were not bound to work the line with any particular description of trains, nor in connexion with their own or the Great Western Railway.

The lord chief justice adopted the view presented by the plaintiffs,

and expressed an opinion that the covenant in question was not a mere covenant to indemnify, but that the defendants were bound to work the West London Railway with passenger trains as well as with goods trains.

It was ultimately agreed that a verdict should be entered for the plaintiffs, subject to a motion by them to take the opinion of the court as to the principle upon which the damages were to be assessed upon the sixth *breach,—assuming that the defendants were bound [*296 (as his lordship had ruled) to work the West London Railway with *passenger* trains as well as with goods trains,—and also to run trains in connexion with their own line, and with the Great Western Railway.

Byles, Serjt., accordingly in Easter Term last, obtained a rule nisi, on the part of the plaintiffs, for a writ of inquiry to assess the damages upon the sixth issue, upon such principle as the court should direct. He submitted that the proper principle would be, upon the assumption that the defendants were bound to work the plaintiffs' line in connexion with, and as a branch of, the North Western and Great Western railways, and with passenger trains as well as with goods trains.

Sir *F. Thesiger*, at the same time, on the parts of the defendants, obtained a rule nisi for a new trial, on the ground of misdirection. He submitted that “efficiently” working the line, meant, working it, not with any particular description of trains, but in such a manner as to produce the greatest advantage to the proprietors.

Sir *F. Thesiger*, *Channell*, Serjt., and *Bovill*, on a subsequent day in the same term, showed cause against the plaintiff's rule.—The question depends upon the construction of the lease, which contains no recital of, nor does it make any reference to, the recital in the act of parliament upon which the plaintiffs must rely to aid the interpretation they seek to put upon the defendants' covenant. The 34th and 35th sections of 3 & 4 Vict. c. cv., the plaintiffs' second act, refer to the agreement between them and the Great Western Railway Company of the 4th of February, 1837, and make provision for the regulation and management of the crossing of the Great Western and the Birmingham, Bristol, and Thames Junction railways at the point of *intersection at Wormwood Scrubbs. The leasing act of 8 & 9 [*297 Vict. c. clvi. recites the London and Birmingham Railway Company's act of incorporation, 3 & 4 W. 4, c. xxxvi., the plaintiffs' act of incorporation, 6 & 7 W. 4, c. lxxix., and the plaintiffs' extension act, 3 & 4 Vict. c. cv., and then recites that “it has been found that the said West London Railway cannot be worked, as a separate and independent undertaking, with advantage to the proprietors thereof; but the same might be advantageously worked and used in connexion with the said London and Birmingham Railway and the said Great Western Railway, or either of them, by both or either of the companies to whom the said

last-mentioned railways belong; and the said West London Railway Company are therefore desirous of letting the said railway on lease to the London and Birmingham Railway Company; and the said last-mentioned company are willing to accept such lease, subject to certain terms and conditions which have been mutually agreed on between the said two companies:" it then proceeds to enact "that it shall be lawful for the said West London Railway Company, by and with the consent of a general meeting of the proprietors of the said company, specially convened for that purpose, to demise or lease to the said London and Birmingham Railway Company, for any term not exceeding nine hundred and ninety-nine years, the said West London Railway as authorized to be constructed under the powers of the said recited acts, and all stations, wharfs, lands, buildings, and appurtenances belonging thereto, or held, used, or enjoyed therewith, and *all their rights, powers, and privileges in relation thereto*: and it shall be lawful for the said London and Birmingham Railway Company to accept and take such lease, and to use, exercise, and enjoy all such powers, rights, and privileges as aforesaid, subject to the provisions of this act, and to the performance of the conditions to be contained in such lease." *Sec-
 *298] tion 2 confirms the agreement therefore entered into for the proposed lease. The 3d section recites that "it has been agreed that the said West London Railway and any intended extensions thereof shall be used, occupied, and enjoyed by the Great Western Railway Company jointly and on equal terms with the said London and Birmingham Railway Company," and enacts "that it shall be lawful for the said London and Birmingham Railway Company, and they are hereby required, at any time after they shall have become lessees of the said West London Railway, to admit the Great Western Railway Company to a participation, on equal terms with themselves, in the use, enjoyment, control, and management of the said West London Railway, and the stations, buildings, lands, wharfs, and other conveniences connected therewith, and to the exercise and enjoyment of *all rights, powers, and privileges in relation thereto*, which may be leased to them by the said West London Railway Company; and it shall be lawful for the said Great Western Railway Company, and for the said London and Birmingham Railway Company, to enter into and to carry into effect such arrangements as may have been, or may be hereafter, mutually agreed on between them for insuring to the said two companies respectively such equal use, enjoyment, control, and management of the said West London Railway: Provided, always, that it shall not be lawful for either of the said companies, by virtue of the powers, rights, or privileges which may be conferred on them under or in pursuance of the provisions of this act, to prevent or obstruct the free use of the said railway, at all proper times, by the other of such companies, or by the carriers using their respective railways." Reliance will be placed, on

the other side, upon the words in the 1st section of this act which profess to grant to the defendants all "*the rights, powers, and privileges*" of the plaintiffs in relation to the premises demised, *as implying a transfer to the former of all the *rights* of the latter under [*299 their agreement with the Great Western Railway Company, of the 4th of February, 1837. But that cannot be the true construction of the clause, unless those words could also be held to transfer to and impose upon the defendants all the plaintiffs' *liabilities* in reference to that agreement. The recitals in the preamble of the act are evidently inserted merely to satisfy the requirements of parliament, to satisfy the legislature that there is a reason for that for which its aid is asked. The lease contains no reference to this recital, and therefore cannot be affected by it. The act does not profess to dictate the terms of the lease: that is left entirely to the arrangement of the parties. Even if the recitals in the act had been incorporated in the lease, it would not in any respect have varied the defendants' liability. [WILLIAMS, J.—It might be a question, whether, supposing the jury to be of opinion that it would be for the benefit of both companies to work them together, in the way contended for by the plaintiffs, the omission to do so might not be a breach of the covenant.] The lease purports to be a demise of the West London Railway as an independent line, and the defendants covenant to work it as an independent line. If the defendants are bound to work it in connexion with their own line,—suppose it should at any future time turn out that the North Western Railway could not be profitably worked at all,—could it be contended that they could not discontinue the working, because they were under a covenant with the West London Railway Company? This absurd consequence must necessarily follow, if the construction sought to be put upon the statute and the lease by the plaintiffs be the true one. The fair meaning of covenant in question is, that the lessees shall do for the lessors that which experience had shown that they were utterly unable to do for themselves.

**Byles*, Serjt., *E. James*, and *Aspland*, in support of the plaintiffs' rule.—The main question is, whether the defendants, the [*300 London and North Western Railway Company, have not by their covenant bound themselves to work the West London Railway in connexion with, and as a branch of, their own line, and, further, to enforce against the Great Western Railway Company the performance by them of the agreement of the 4th of February, 1837, by stopping their trains, to meet those of the West London Railway. That the West London Railway Company could compel the Great Western Railway Company to stop their trains in the manner pointed out in the agreement, is beyond doubt: and it is equally clear that all the *rights, powers, and privileges* of the plaintiffs in relation to their railway and works,—and one of those works, is, the station at Holsden Green erected for the purpose

of taking up and letting down passengers,—are by the lease transferred to and vested in the defendants. [JERVIS, C. J.—What provision in the act requires the defendants to stop either their own trains or those of the Great Western Railway?] None, in terms. The recital in the leasing act, 8 & 9 Vict. c. clvi.,—to the obtaining of which the defendants necessarily must have been parties,—shows that it was well known to the parties that the line about to be demised could not advantageously be worked as a separate and independent undertaking, but that it was contemplated that it might be advantageously worked in connexion with either or both of the companies mentioned. The whole scope of this parliamentary arrangement imports an agreement that the lines shall be worked together; and, with this understanding, the defendants covenant “efficiently to work and repair the railway and works demised.” Before the passing of that act, the Great Western Railway Company had entered into the agreement with the plaintiffs, under which they *301] were *bound to stop certain of their trains: and the act, in section 3, expressly provides that the Great Western Railway Company shall be admitted to a participation with the London and Birmingham Railway Company in the use of the West London Railway. What is the meaning of working in connexion, unless there is a correspondence between the respective trains? The lease professes to be founded upon the act; and was intended to be an execution of the powers conferred thereby. It is clear that the defendants might maintain an action against the Great Western Railway Company for a refusal to stop their trains pursuant to the agreement of the 4th of February, 1837. Efficiently to work, means, to work with effect, to make profits; and the only way, as appears from the act, of making profits, is, to work the railways in question in connexion with each other. If there be any doubt upon the language of the covenant, it must, according to the known rule of construction, be taken most strongly against the covenantors. Supposing the plaintiffs’ construction of the statute and of the covenant to be untenable, it by no means follows that this is not a case for serious damages. It may be that the defendants are bound to work the plaintiffs’ line so as to promote the interests of both parties. That they confessedly have not done.

Cur. adv. vult.

JERVIS, C. J., in the early part of the present term, intimated that the court were desirous of hearing the case further discussed, with reference to one question which had not been very much considered, viz., the question whether the rights and powers conferred upon the plaintiffs under their agreement with the Great Western Railway Company, of the 4th of February, 1837, were so transferred by the lease as to be binding and obligatory on the defendants.

*302] *Channell, Serjt., and Bovill, for the defendants.—It is submitted, in the first place, that the London and North Western

Railway Company had no power to enforce against the Great Western Railway Company the performance of the agreement which the latter had entered into with the West London Railway Company; and, secondly, that, if they *had* the *power* to do so, they were not *bound* by their covenant with the West London Railway Company to exercise it.

1 The defendants were not parties, or in any way privy to the agreement of February, 1837, or to the preliminary matters recited therein. It may be that the plaintiffs may have contemplated that the Great Western Railway Company should stop their trains in the manner mentioned in the agreement; but there is no absolute engagement that they shall do so. [CRESSWELL, J.—The fourth, fifth, sixth, and seventh clauses of the agreement look very much the other way: the penalty would be absurd, if the parties intended to be bound only so long as either pleased. If the Great Western Railway Company found that it was not to their interest to continue the accommodation pointed at by the agreement, they were not bound to go on. [TALFOURD, J.—Then it is no agreement. MAULE, J.—The 7th article of the agreement is, that “the said Great Western Railway Company shall stop such of their trains as the Thames Junction Railway Company shall have declared, in manner aforesaid, their intention of meeting by corresponding trains at the said station, for the purpose of taking up and setting down such passengers as may require to be transferred to or from the trains of the said Thames Junction Railway Company, and may be respectively ready for the purpose; and, in default thereof, the said Great Western Railway Company shall pay a penalty to the said Thames Junction Railway Company, of 20*l.* each for such omission.”] Would the Great Western *Railway Company be bound for all time? [*303 [JERVIS, C. J.—None of us feel any difficulty as to this point. The other is the point upon which some doubt has arisen, viz., whether the rights of the West London Railway Company under the agreement are transferred to the London and North Western Railway Company, either by the lease, or by force of the act of parliament under which the lease was granted.]

2. The next question is, whether, supposing the power of enforcing the agreement with the Great Western Railway Company to exist, it has been so transferred to the defendants as to empower and oblige *them* to enforce it. Neither the lease nor the agreement made in contemplation of it, nor the act of parliament under which the lease was granted, contains any provision making it obligatory upon the defendants to enforce the agreement with the Great Western Railway Company, or any the most remote reference to it, except that the recital of that act refers to the 3 & 4 Vict. c. cv., the 34th, 35th, 36th, and 37th sections of which do make mention of that agreement. Those provisions, however, were addressed to a totally different matter, viz., the security of the public against accidents which might result from the crossing of

two lines of railway in the manner proposed. [JERVIS, C. J.—The reference in the recital in the 8 & 9 Vict. c. clvi., to the 3 & 4 Vict. c. cv., was merely for the purpose of showing that the plaintiffs' company had changed its name.] The 8 & 9 Vict. c. clvi., *empowered*, but did not *oblige*, the West London Railway Company to grant, and the London and Birmingham Railway Company to take, a lease of the West London Railway; and it left them to make such stipulations as they pleased, provided they were not inconsistent with the provisions of the act: s.

2. The lease purports to follow the enacting words of the statute: the lessees propose to take upon themselves the duties, and to clothe them-

*304] selves *with the rights, imposed upon and acquired by the lessors under their acts of parliament. There is nothing to extend the words so as to make them comprehend a contract which the lessors had voluntarily entered into with third parties. The defendants had no notice of that agreement. If the lease be looked at, unaided by the act of parliament, the lessees are not bound by the agreement: and, if the enacting part of the act,—which is alone the operative part,—be looked at, it will be found that all that the West London Railway Company professed to demise, or the London and Birmingham Railway Company to take, was, “the said West London Railway as authorized to be constructed under the powers of the said recited acts, and all stations, wharfs, lands, buildings, and appurtenances belonging thereto, or held, used, or enjoyed therewith, and all their rights, powers, and privileges in relation thereto.” [MAULE, J.—Is it contended that the

defendants are placed in the same position as the plaintiffs stood in with regard to the Great Western Railway Company, as to liabilities as well as rights and privileges?] The plaintiffs must so contend. But it is submitted that the defendants would have no power to enforce that contract. [JERVIS, C. J.—Why not? The act of parliament empowers the West London Railway Company to lease their line and all their rights, powers, and privileges in relation thereto; and in the lease they profess to exercise that power.] The utmost extent of what the defendants could acquire by the lease, would be, an *option* to stop the Great Western trains, if they pleased: no *obligation* is cast upon the defendants to stop the Great Western trains, or to sue the Great Western Railway Company for refusing to stop: and clearly a court of equity would not enforce specific performance of the agreement at the instance of defendants. [CRESSWELL, J.—Would

the Great Western Railway Company be bound to act upon any notice

*305] *which did not come from the West London Railway Company?] Clearly not. Some reliance may be placed upon the 4th section of the 8 & 9 Vict. c. clvi., which enacts “that all actions, suits, indictments, informations, and other proceedings whatsoever, at law or in equity, which could or might have been brought or instituted by or against the said West London Railway Company if this act had not

been passed, with reference to any act or default relating to the said West London Railway, and which may occur after the leasing thereof to the said London and Birmingham Railway Company, shall, during the continuance of such lease, be brought or instituted by or against the said London and Birmingham Railway Company, in like manner as though the said last-mentioned company had in all cases been named in the said recited acts relating to the said West London Railway, or were now substituted therein for the said West London Railway Company, or for the Birmingham, Bristol, and Thames Junction Railway Company as the case may be." But that clause clearly has reference to a totally different state of things from that now under consideration; and that section, as well as the 9 & 10 Vict. c. ccclxix., ss. 1, 32, are quite incompatible with the incorporation of the Great Western Railway Company's agreement into this lease. [MAULE, J.—The meaning of the covenant into which the defendants have entered, possibly may be, that they will so work the West London Railway as to avoid a forfeiture under the 210th section of the 6 W. 4, c. lxxix., (a) and not with reference to the *production of the greatest possible amount of profit. [*306 I incline to think that the true meaning is, that the defendants are to have the railway for their own profit; and that, provided they work it *bonâ fide* in the way most conducive to their own advantage, they do all that they are bound by their covenant to do. Suppose it turned out that the public convenience did not call for passenger trains, and the exclusion of passenger trains was found beneficial, as between these parties, I should say that that would be an efficient working of the railway.] As between the company and the public, there might be an obligation to run passenger trains: but, as between these two companies, it never could be intended that the defendants should be bound to run passenger trains, at whatever cost and disadvantage: and it certainly is not so expressed. The extent of the obligation cast upon the defendants by their covenant, is, to work the railway in a *bonâ fide* and reasonable manner as a railway, and to indemnify the plaintiffs against all losses and forfeitures in consequence of any want of repair, or in consequence of not working the line. Any other construction would be a violation of the proviso that the lessors shall have no control over the working or management by the lessees of the railway or works demised.

Byles, Serjt., and Aspland, contra.—The Great Western Railway

(7) Which enacts "that, if the said railway, or any part thereof, shall at any time hereafter be abandoned or given up by the said company, or after the same shall have been completed, shall for the space of three years cease to be used and employed as a railway, then and in such case the lands so purchased or taken by the said company for the purposes of this act, or otherwise the parts thereof over which the said railway, or any part of such railway which shall be so abandoned or given up by the said company shall pass, shall vest in the owners for the time being of the land adjoining that which shall be so abandoned or given up, in manner following, that is to say one moiety thereof in the owners of the land on the one side, and the remainder thereof in the owners of the land on the other side thereof."

Company obtained their act of incorporation, 5 & 6 W. 4, c. cvii., in the year 1835. In 1836, the plaintiffs' act of incorporation, 6 W. 4, c. lxxix., was passed. The plaintiffs having obtained a grant of *307] certain land, over a portion of which it was proposed to conduct the Great Western Railway, negotiations took place between the two companies, which ultimately resulted in the agreement of the 4th of February, 1837,—the effect of which agreement was, for ever to amalgamate the two lines of railway, to the extent at least of giving to each a right to use the other. [CRESSWELL, J.—The stipulations as to the stopping of trains do not give the Great Western Railway Company a right to use the West London Railway.] At all events, it gives to each party certain rights and privileges with respect to the other. And this agreement has all the force and sanction of a parliamentary contract, by the reference to it in the 3 & 4 Vict. c. cv., ss. 34, 35, 36, and 37. Now, it appears from the recital in the leasing act, 8 & 9 Vict. c. clvi., and also from the evidence in the cause, that the West London Railway could not be worked, as a separate and independent undertaking, with advantage to the proprietors, and could only be made profitable by being worked in connexion with the London and Birmingham Railway and the Great Western Railway, or one of them. And there is a station at Holsden Green and another at the point of intersection of the Great Western Railway, which can only be made available by their being so worked in connexion. The leasing act, 8 & 9 Vict. c. clvi., recites this act of 3 & 4 Vict. c. cv., which turns the agreement of the 4th of February, 1837, into a *quasi* act of parliament. [MAULE, J.—It recites it simply as an act which changes the name of the company.] The act then recites that upon which the argument will mainly turn, viz. that “it has been found that the West London Railway Company cannot be worked, as a separate and independent undertaking, with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connexion with the London and Birmingham Railway and the *308] Great Western Railway, *or either of them, by both or either of the companies to whom the said last-mentioned railways belong; and that the West London Railway Company were therefore desirous of letting the said railway on lease to the London and Birmingham Railway Company; and that the last-mentioned company were willing to accept such lease, subject to certain terms and conditions which had been mutually agreed on between the said two companies:” the enacting part of the 1st section then enacts, that “it shall be lawful for the West London Railway Company to demise or lease to the said London and Birmingham Railway Company, for any term not exceeding nine hundred and ninety-nine years, the said West London Railway as authorized to be constructed under the powers of the said recited acts, and all stations, wharfs, lands, buildings, and appurtenances belonging thereto, or held, used, or enjoyed therewith,

and all their rights, powers, and privileges in relation thereto; and it shall be lawful for the said London and Birmingham Railway Company to accept and take such lease, and to use, exercise, and enjoy all such powers, rights, and privileges as aforesaid, subject to the provisions of this act, and to the performance of the conditions to be contained in such lease." An act of parliament was necessary to transfer to the assignees of the reversion the right, power, and privilege of stopping the Great Western trains, pursuant to the terms of the agreement of the 4th of February, 1837, which at common law was incapable of being assigned. And the effect of the 4th section is, to transfer to the London and North Western Railway Company all liabilities for any defaults for which the West London Railway Company would before have been responsible. Thus stood matters at the time the lease in question was granted. By that lease, the West London Railway Company, in the terms of the act of parliament, demise and lease to the London and Birmingham Railway Company *the West London Railway as authorized to be constructed [*309 under the powers of the acts recited in the 8 & 9 Vict. c. clvi., and all stations, wharfs, buildings, and appurtenances thereto belonging, or held, used, or enjoyed therewith, and the rates and tolls payable in respect thereof, together with all the rights, powers, and privileges of the West London Railway Company in relation thereto: and the lessees covenant that they will, during the continuance of the lease, *efficiently work and repair the railway and works thereby demised*, and indemnify the lessors against all liabilities, loss, charges and expenses, claims and demands whatsoever incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the railway and works. More large and comprehensive terms it is difficult to conceive. And, if there is anything equivocal in the words "efficiently work," it must be remembered that they are the words of the covenantors. "*Verba fortius accipiuntur contra proferentem.*" In Bacon's commentary on this maxim, it is said: "This rule, that a man's deeds and his words shall be taken strongest against himself, though it be one of the most common grounds of the law, it is notwithstanding a rule drawn out of the depth of reason; for, first, it is a school-master of wisdom and diligence, in making men watchful in their own business; next, it is author of much quiet and certainty, and that in two sorts,—first, because it favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors,—and, secondly, because it makes an end of many questions and doubts about construction of words; for, if the labour were only to pick out the intention of the parties, every judge would have a several sense; whereas, this rule doth give them a sway to take the law more certainly one way." The more probable meaning of the parties,—regard being had to the known *condition of [*310 this railway,—was, that it should be worked, not as a separate

undertaking, which the act recites was not a profitable, and consequently could not be considered an *efficient*, mode of working; but that it should be worked in connexion with the two great railways with which it communicated. And it was to carry out this object that the 3d section of the act provided that the Great Western Railway Company should be admitted to a participation in the use of the line to be leased and made under the act. To work *efficiently* must mean something more than simply to work,—it must necessarily mean, to work to the reasonable extent of the ability of the covenantors, regard being had to their resources and their capabilities of well and efficiently working. [MAULE, J.—If you succeed in satisfying the court that the rights, powers, and privileges of the West London Railway Company under their agreement of the 4th of February, 1837, with the Great Western Railway Company, pass by this lease to the defendants, you will relieve yourself of a great difficulty, I may say of *all* difficulty, on this part of the case.] The defendants were bound to take notice of that agreement, although it is not referred to in the lease; for, it is expressly recognised and referred to in the 34th, 35th, 36th, and 37th sections of the 3 & 4 Vict. c. cv., which is recited in the leasing act of 8 & 9 Vict. c. clvi. In Vin. Abr. *Notice* (A 2), pl. 10, it is said,—“None is bound by the law to give notice to another of *that which that other person may otherwise inform himself of*; except he tie himself by special covenant and agreement to do it; for, the law will not put an unnecessary trouble upon any man without his own consent.” Again, pl. 12,—“Notice is not necessary when the thing is as much in the cognisance of the one as the other.” The agreement which was entered into in 1845, and which is alluded to in s. 3, may throw some light upon *311] the question. [JERVIS, C. J.—*That ceased to have any binding force, upon the making of the lease.] The court cannot well arrive at the intention of the parties, without looking at that agreement, as well as at the lease and the act of parliament.

JERVIS, C. J.—At the trial of this cause before me, it was agreed between the parties that a verdict should be entered for the plaintiffs, subject to a motion by my brother *Byles* to take the opinion of the court as to the principle upon which the damages were to be calculated, in the event of the plaintiffs being held entitled to retain the verdict; and, for the purpose of that investigation, it was admitted that the plaintiffs were entitled, because, according to that view, the efficiently working the line was to comprehend the working of passenger trains, and this the plaintiffs have not done. It is unnecessary to consider whether that point is rightly or wrongly ruled, because, for the purpose of this motion, it is conceded on the part of the defendants that they must be assumed to be bound to run passenger trains. It was urged by my brother *Byles*, that, for the purpose of ascertaining the damages in this case, he was entitled to contend that the defendants, as

lessees of the West London Railway Company, were bound to work the West London Railway as a branch of, and in connexion with, the London and North Western Railway, and, further, that they were bound to exercise the powers and rights which the West London Railway Company had by virtue of the agreement entered into between themselves and the Great Western Railway Company, in February, 1837. Upon the former occasion, the court, composed of my brothers CRESSWELL, WILLIAMS, TALFOURD, and myself, entertained no doubt whatever that the defendants, the North Western Railway Company, were not bound to stop their trains, so as to work the West London Railway in conjunction with, and as a branch of, their own railway. But, some doubt *having been entertained, whether, under the terms of [*312 their covenant *efficiently* to work the West London Railway, the defendants were not bound to exercise the powers and authorities conferred by the agreement of the 4th of February, 1837, made between the West London Railway Company and the Great Western Railway Company, a second argument was directed, with a view to the better understanding of that point.

It appears from the lease, and the recital in the act of parliament which authorizes it, that the West London Railway could not, as a separate and independent undertaking, be worked with advantage, that is, with profit to the shareholders; but the act recites that it was possible that the West London Railway might be advantageously worked by the London and North Western Railway Company, in conjunction with their line, or with the Great Western Railway, and accordingly it authorizes the West London Railway Company to lease their railway to the London and North Western Railway Company, together with all their rights, powers, and privileges in relation thereto. But it is observable that all that is leased, is, the West London Railway; and there is no reference or allusion whatever, from the beginning to the end of the lease, to any authority or any liability of the London and North Western Railway Company to stop their trains, or to work them in connexion with the West London Railway. At the most, the plaintiffs are entitled to contend that the defendants are bound by their covenant *efficiently* to work that which is the subject-matter of the demise. That which is demised, is, no authority or control over the North Western Railway Company, but the West London Railway. It does not follow, that, because the London and North Western Railway Company are lessees of the West London Railway, they are bound to alter the manner of working their own line, for the purpose of more *efficiently* and profitably working *that which is the subject-mat- [*313 ter of the demise; for, in that case, as was observed in the course of the argument, they would be precluded from stopping the working of their own line, or making any deviation or alteration in their line which might sever the connexion between the Holsden station and

their own line, during the term of nine hundred and ninety-nine years created by the demise. The court is, therefore, unanimously of opinion, that, in the working of the West London Railway efficiently, within the terms of their covenant, the London and North Western Railway Company are not bound to work it in connexion with and as a branch of their line.

The question then is, whether the defendants, as representing the West London Railway Company, take all the rights and privileges of the West London Railway Company, and, amongst them, the power and authority to stop the trains of the Great Western Railway Company. I apprehend, in the first place, that the agreement of the 4th of February, 1837, and the powers and authorities under that agreement, do not pass to the London and North Western Railway Company under the lease. They could only pass by force of the act of parliament; and I find no words in the 8 & 9 Vict. c. clvi., which confer upon the West London Railway Company the right to convey the authority in question to the London and North Western Railway Company. The only power the statute gives them, is, to demise their railway for a given term: the agreement between the West London Railway Company and the Great Western Railway Company is never once alluded to; and the 3d section contains a provision which is in some measure inconsistent with it, and which will explain the words rights, powers, and privileges, with reference to the agreement, so as to give them full effect. They may mean all the rights, powers, and privileges which the West London *314] Railway has acquired, as a railway, by the act of parliament, and those only. If so, they had no power to convey to the London and North Western Railway Company, the agreement with the Great Western Railway Company, or the rights they acquired under it. And it seems to me that it would be highly unreasonable that they should have such power. That agreement is not mentioned in the lease. If the London and North Western Railway Company take the power of controlling the Great Western Railway Company, they must, on the other hand, also take upon themselves the obligations of the West London Railway Company to the Great Western Railway Company: and it is, I conceive, impossible to contend that the Great Western Railway Company has, by virtue of the act of parliament, any power to enforce the penalties against the London and North Western Railway Company, if they refuse to stop their trains. The act of parliament, I think, confers upon the West London Railway Company no power to transfer their rights under that agreement; and they have not, in fact, transferred them: consequently, the defendants were not bound to work the West London Railway either in connexion with or as a part of their own line; nor were they bound to require the Great Western Railway Company to stop their trains.

I believe the real history of the agreement and lease to be this. It

was found that the West London Railway could not profitably be worked by itself; but it was thought that it might be availably worked as a part of, or in connexion with, the London and North Western Railway, or the Great Western Railway; and it is left to their mutual interest to work in connexion or otherwise, as such interest may suggest; but, in order to prevent a forfeiture, and to avoid those liabilities which the act authorizing the making of the railway imposes upon *them, they [*315 take from the defendants a covenant efficiently to work the railway,—that is, honestly and fairly, and not colourably,—so as to satisfy those requirements.

In estimating the damages, therefore, I am of opinion that we must reject the two propositions which have been contended for on the part of the plaintiffs, and must tell the jury that the defendants were not bound to work the West London Railway as a branch of, and in connexion with, the London and North Western Railway, and that the defendants were not bound to stop the trains of the Great Western Railway Company.

MAULE, J.—I am of the same opinion. The only point to which my attention has been directed,—not having been present at the former argument,—is the single question whether the lease of the 10th of March, 1846, or the act of parliament under the authority of which it was made, transfers the agreement of the 4th of February, 1837, made between the plaintiffs and the Great Western Railway Company, so as to make it operate as a valid and binding agreement as between the plaintiffs and the defendants. I am of opinion that it does not. If any such intention had existed in the minds of the legislature, or of the parties to the lease, it would have been expressed by apt and suitable words. Such an agreement as this at common law would not be transferable: to make it so, the power of parliament must be called in aid. It is very unlikely that an act of parliament for a purpose so singular and unusual as the transfer of the rights and liabilities under such an agreement as this, to new parties, would be couched in such very general words as are found in the act in question. No specific reference is made to the agreement, which one would naturally have expected to find, if such intention as that suggested had existed: and, if any such intention *had* existed, there would probably have been *some [*316 stipulation or provision for duly carrying it out. Nothing, however, of the kind is to be found either in the lease or in the act of parliament. It has been contended that this liability arises under the covenant “that the London and Birmingham Railway Company (the defendants) shall, at their own expense, during the continuance of the lease, *efficiently work* and repair the railway and works hereby demised, and *indemnify the West London Railway Company against all liabilities, loss, charges and expenses, claims and demands whatsoever, incurred or sustained in consequence of any such want of repair, or in*

consequence of not working, or in any manner connected with the working of, the same railway and works." I think that very distinctly points out that the defendants are to work the railway, not colourably, but efficiently, that is, so as to prevent any damage to the plaintiffs, or any forfeiture that might result from an omission to work it; and that, if the defendants work it so as to prevent such damage or forfeiture, that is an efficient working within the meaning of the covenant. The clause goes on, in the same sentence,—“but the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham Railway Company of the West London Railway or works.” If the West London Railway Company were to have the power they now contend for, viz. to compel the defendants to work the demised railway in connexion with and as a part of their own line, and under the terms of the agreement with the Great Western Railway Company, they would undoubtedly be assuming a control over the working or management by the London and Birmingham Railway Company of the West London Railway. Taking the whole of the provisions of the lease together, it amounts to this, that the lessees shall work the railway so as to prevent any loss or forfeiture, or any injury *317] to the lessors *in consequence of not working*, but, so long as they do that, they may work it in any way they please, the lessors expressly renouncing all right in any way to control or interfere with their management. Not only is there an entire absence of special words to serve so very special a purpose as the transfer of this agreement,—which I think sufficient to induce a construction which should exclude that operation from the act of parliament and the lease; but I think also, that the lease itself, if carefully looked at, so far as this, the main provision which is relied on, goes, contains express words which are inconsistent with, if they do not altogether exclude, such a transfer of the agreement as is contended for on the part of the plaintiffs. I, therefore, as to that point, entirely agree with the lord chief justice in the conclusion which he has come to.

CRESSWELL, J.—I am of the same opinion. As to the first point, I do not think it necessary to add anything to what has fallen from the lord chief justice. As to the other point, the question is, whether the agreement which was entered into between the Great Western Railway Company and the West London Railway Company is to be considered as absolutely transferred, by virtue of the act of parliament and lease, to the London and North Western Railway Company, so as to be binding upon them, and also upon the Great Western Railway Company with reference to them. The act of 8 & 9 Vict. c. clvi., which enabled the West London Railway Company to grant the lease, contains various recitals as to the position of the company; but there is no mention of this agreement between them and the Great Western Railway Company: and I cannot help thinking that it would not have been overlooked, if

it had been intended that any rights or liabilities under that agreement should pass by the proposed lease. After *reciting the unpro- [*318] mising state of the West London Railway, and the agreement entered into with the defendants for a lease of it, subject to certain terms mutually agreed upon, the act, in section 1, enables the company to grant a lease for nine hundred and ninety-nine years, "together with all their rights, powers, and privileges in relation thereto,—not a word about liabilities, nor anything tending to show that the parties contemplated, or that the legislature intended to sanction, a transfer of the agreement of the 4th of February, 1837, so as to place the defendants and the Great Western Railway Company in the situation of parties mutually contracting with each other. The 3d section of the act likewise rather tends to the inference that the parties never contemplated any such transfer: it provides that the Great Western Railway Company shall be admitted to a participation in the use of the West London Railway upon equal terms with the London and Birmingham Railway Company,—a provision which would have been unnecessary, if the construction contended for on the part of the plaintiffs was the correct one. Then, the lease itself, in similar terms, grants unto the London and Birmingham Railway Company the West London Railway, and all stations, &c., "together with all the rights, powers, and privileges of the West London Railway Company in relation thereto,—not in relation to the Great Western Railway Company, or to *their* mode of working their line. There is nothing, therefore, to show that the parties contemplated anything of the sort, or to show that they intended a transfer to the defendants of the agreement of the Great Western Railway Company with the plaintiffs, so as to be binding either upon the Great Western Railway Company, or upon the defendants in relation thereto. I therefore think the defendants have not bound themselves to work the West London Railway efficiently, in the sense contended for by my brother *Byles*.

*TALFOURD, J.—I am entirely of the same opinion. It appears [*319] to me that the general words in the lease which are relied on, are quite insufficient to confer upon the London and North Western Railway Company, the power of enforcing against the Great Western Railway Company the agreement made by that company with the West London Railway Company. The general scope of the 8 & 9 Vict. c. clvi., also tends to show that no such power was intended to be conferred by the legislature. And, if the power did not exist, it could not be the duty of the defendants to exercise it.

JERVIS, C. J.—The rule will be absolute for the assessment of damages upon the principle above stated, upon the issue on the sixth breach,—the damages on the first, second, and third breaches being nominal, and on the fourth and fifth for the amounts agreed on.

Rule accordingly.

Byles, Serjt., and *Aspland*, on a subsequent day, showed cause against the defendants' rule for a new trial.—The direction of the lord chief justice was perfectly unexceptionable. The true meaning of the defendants' covenant efficiently to work the railway demised, was, that they should work it in the manner in which railways are usually worked, and in which this one had already been worked, viz. with *passenger* trains as well as *goods* trains. It may be at once conceded that there are no words in the West London Railway Company's act of incorporation, the 6 W. 4, c. lxxix., to make it incumbent on that company to carry either passengers or goods: the act does not compel them to become carriers: *Palmer v. The Grand Junction Railway Company*, 4 M. & W. 749, 766;† *Ex parte Robins*, 7 Dowl. P. C. 566. The plaintiffs, however, had so worked the *railway; and the provisions of the

*320] lease clearly indicate that the parties contemplated a continuance of that mode of carrying on the concern. The profits to be received by the plaintiffs depend upon the two descriptions of working being carried on by their lessees. The omission to do so clearly amounts to a breach of the letter and the spirit of the contract. *Ellen v. Topp*, 6 Exch. 424,† is a somewhat analogous case; there, by the terms of an indenture of apprenticeship, an infant was placed by his father (who was a party to the indenture) as apprentice to a master, described in the indenture as "an auctioneer, appraiser, and corn-factor," "to learn his art, and with him after the manner of an apprentice to serve." After the making of the indenture, and the commencement of the apprenticeship, the master wholly relinquished the trade of corn-factor; whereupon the apprentice absented himself from his master's service. In an action on the indenture, by the master against the father, for the desertion of the apprentice, it was held that the relinquishment by the master of his trade of corn-factor was a good answer to the action. [MAULE, J.—Would not the lessees satisfy this covenant by keeping the railway in proper order, so as to enable the public to travel on it with their own locomotives and carriages?] It is submitted they would not. They are bound to work and repair the railway and works demised,—including, of course, the stations, which are only applicable to passenger traffic. [MAULE, J.—The covenant for indemnity throws some light upon the other branch. The question is, whether the meaning of the covenant efficiently to work means any more than that the lessees will perform the duty which the lessors themselves owe to the public.—or, in other words, whether the object of the covenant was, the realization of the largest amount of gross profits, or merely to compel the

*321] lessees to do what the lessors themselves were bound to *do.] Looking at the whole instrument, and at the relative situation of the contracting parties, as well as at the recitals in the 8 & 9 Vict. c. clvi., it is manifest that the lessees are not justified in abstaining from the exercise of one source of profit. [MAULE, J.—It is difficult

to reconcile your argument with the proviso in the lease, that the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham Railway Company of the West London Railway or works; for, if the former are entitled to insist that their railway shall be worked in the way best adapted to secure their interest, they will be exercising a control over the management, not of the West London Railway only, but of the London and North Western Railway also.] That is not the plaintiffs' argument: all they say, is, that they are entitled to insist that the railway shall be worked in the usual and accustomed manner, viz. with passenger trains as well as goods trains. The suggestion that this is a mere covenant to indemnify the lessors, and that the railway will be efficiently worked, if so worked as to satisfy the liability incurred by the West London Railway Company to the public, is now for the first time made. It clearly is not the natural construction: and it entirely destroys the plaintiffs' security for that which was their main inducement to grant the lease.

Channell, Serjt., and *Bovill*, for the defendants, submitted, that the covenant in question at the most amounted to a covenant to indemnify the lessors against any forfeiture which might result (under the 210th section of the 6 W. 4, c. lxxix.,(a)) from the defendants' omission duly to complete the railway, or to afford the public the accommodation thereon which the plaintiffs had *contracted to furnish to them, [*322 so as to preserve their reversionary interest therein; that the covenant was well performed by working the railway in a reasonable manner, regard being had to the interest of the lessees; and that they were not bound to work it with passenger trains, at the risk of loss to themselves.

JERVIS, C. J.—I am of opinion that this rule should be made absolute. At the trial, it was contended, on the part of the plaintiffs, that, in order to satisfy their covenant efficiently to work the railway demised, the defendants, the lessees, were bound to work it with passenger trains as well as goods trains. The learned counsel for the defendants, on the other hand, insisted, as they have insisted upon this argument, that that was not the true meaning of the covenant, but that it was a covenant to indemnify only; and that, as it had been shown that the working the line with goods trains only had been equally if not more productive than working it in any other way would have been, the covenant was satisfied, and the defendants had been guilty of no breach. I adopted the view presented on the part of the plaintiffs, in preference to that urged for the defendants, and intimated an opinion that the covenant in question was not a mere covenant to indemnify, but that the defendants were bound to run passenger trains. Upon further consideration, however, of the case,—and, indeed, during the discussion of

(a) *Ante*, p. 305 (a).

the other rule,—I entertained doubts whether the view I then adopted was the correct one; and I am now satisfied that I was wrong, not because I did not adopt the argument urged on the part of the defendants, but because the suggestion thrown out by my brother MAULE during the argument is the true view of the case. The plaintiffs are under an engagement to the public to maintain and to work the railway. They lease the railway to the defendants, in consideration of a certain sum of money, and *of certain shares of the gross receipts and

*323] profits of the line; and they take from them a covenant that they will, “at their own expense, during the continuance of the lease, efficiently work and repair the railway and works thereby demised, and indemnify the lessors against all liabilities, loss, charges and expenses, claims and demands whatsoever, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway and works:” but annexed to this covenant is the following proviso,—“but the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham Railway Company of the West London Railway and works.” It is contended on the part of the lessors, that they have a right to insist upon the lessees’ working the line in a particular way, and with a particular description of carriages, and so they would indirectly assume to themselves that very control which the covenant itself expressly provides that they shall not have. I think the proper construction of the covenant is this,—that the lessees are to take upon themselves the obligations which are by the act of parliament cast upon the West London Railway Company, and that that is the extent of the responsibility which this covenant casts upon them. The covenant will not enable the lessors to say how and in what manner the lessees shall work the line, or in any way indirectly to assume the management and control of it. I think, therefore, that the defendants are not bound by their covenant to run passenger trains as well as goods trains, but that they shall keep open and work the railway in such manner as to relieve the lessors from the liabilities incurred by them under the act of parliament; and that, having done that, they are not liable to this action.

*324] *MAULE, J.—If the covenant in question were to receive the construction contended for on the part of the plaintiffs, viz. that the defendants are to work the West London Railway in such a manner as to produce the largest amount of gross proceeds, not only would there be a possibility, but a very great probability, that it might enure as a covenant by them so to work the railway as to entail upon them a ruinous loss. Undoubtedly, if a person is so unwise as to enter into such a covenant, effect must be given to it, if the words are clear. But it is very unlikely that a covenant of that sort should be entered into; and it is not to be inferred from language which is fairly and reasonably

susceptible of an equally probable interpretation not involving such an absurdity. Where a covenant may have two meanings, each of which is equally probable, in each of which the words are capable of expressing the same thing, and the question is, in which of the two senses it is to be understood, that meaning, which it is most probable the parties contemplated, is the one that is to be adopted. It seems to me that the more probable meaning of this covenant is that which the lord chief justice has adverted to, viz. that in which the lessors provide only that they shall not, in consequence of the neglect of any of the duties or obligations they owe to the public, or of the nonperformance of anything necessary to be done on their part to retain their rights over the railway, sustain any loss or damage. Looking at the words of the covenant, and at the context, it seems to me that that is by far the more probable construction. Nothing can be more improbable than that, where a great railway company takes a lease of a small railway, to be worked in conjunction with its own line, it should contemplate any other than the liberty of dealing with the subject-matter of the demise as its own ideas of its own interest may suggest: and if, in doing that, some injury or inconvenience, or some undue *responsibility, is likely to be cast upon the lessors, it is very natural that that should be provided for. In the present case, I entertain no doubt that the object and intention of the parties to this lease, was, that the London and North Western Railway Company should have this piece of railway to annex to their own line, and to work it in such a manner as they might deem most subservient to their own interest: but that, inasmuch as if they were to act upon that general power, they might in certain special circumstances produce results which might be injurious to the lessors, those results are specially provided against. The effect, therefore, of the covenant I conceive to be, that, though the lessees may work the West London Railway according to their pleasure, they will not so use it, or abstain from using it, as to cause any forfeiture, loss, or damage to the lessors. This view is, as it seems to me, strongly confirmed by the general scope and object of the lease; and great light is thrown upon it by the concluding words of the covenant in question, which expressly exclude the lessors from having any control over the working or management of the line by the lessees. The covenant has nothing at all to do with making the greatest amount or any amount of gross proceeds; but its object is merely to prevent forfeiture or injury to the lessors by the omission of the lessees to perform the duties and obligations which their act of incorporation cast upon the lessors; leaving wholly untouched the mode of working. If the lessees work the line so as to satisfy those obligations, and duly furnish the stipulated accounts, they have performed their covenant. For these reasons, I think that the true construction of the covenant is one of which it is no violation

on the part of the covenantors not to run passenger trains ; and, consequently, I think this rule should be made absolute.

*326] *CRESSWELL, J.—I am entirely of the same opinion. I forbear to add anything to what has been said by my lord and my brother MAULE, because I think enough has been said to enable the judge whose duty it may be to try this cause, to see upon what ground the decision we have come to proceeds, and because we have been very candidly told by the parties that they mean to take the opinion of a court of error upon the whole case.

TALFOURD, J., concurred.

Rule absolute.

JERVIS, C. J.—As it is the intention of the parties to have a bill of exceptions, they might arrange so as to save the expense of going down again. I should certainly rule *at nisi prius* in conformity with the principles we have laid down upon this and the former rule, which might at once be turned into a bill of exceptions.

This suggestion of the court was not acted upon. The cause went down again, and a bill of exceptions was tendered to the ruling of the lord chief justice. The decision of the court of error thereon is subjoined.

*327] *IN THE EXCHEQUER CHAMBER.

The WEST LONDON RAILWAY COMPANY v. The LONDON AND NORTH WESTERN RAILWAY COMPANY. *Jan. 28, 1853.*

In 1836, a company (afterwards called the West London Railway Company) was incorporated by act of parliament, for the making of a railway from the Kensington Canal, to join the London and Birmingham (afterwards called the London and North-Western) and the Great Western railways, at a place called Holsden Green ; and certain duties were by the act cast upon the company ; and, amongst other things, it was provided, that, if the railway should be abandoned, or should, after its completion, cease for the space of three years to be used as a railway, the land taken by the company for the purposes of the act, should revert to the owners of the adjoining land.

In February, 1837, the West London Railway Company entered into an agreement with the Great Western Railway Company, under which the last-mentioned company bound themselves to stop certain of their trains at a point where their railway intersected the West London Railway, for the purpose of transferring passengers and goods from one railway to the other. and to stop their trains for the purpose of meeting corresponding trains of that company, in the manner particularly detailed in the deed.

In 1840, another act, 3 & 4 Vict. c. cv., passed, giving further powers to the West London Railway Company ; the 34th section, reciting the agreement of February, 1837, regulated the mode of crossing until the plaintiffs' railway should be completed ; the 36th section saved the plaintiffs' rights under that agreement ; and the 37th section provided, that, if the plaintiffs' line was abandoned, or ceased to be used as a railway for three years after its completion, then, on payment or tender to them by the Great Western Railway Company of the purchase-money of the piece of land where the railways crossed, the said land should vest in the Great Western Railway Company

By a subsequent act (6 & 9 Vict. c. clvi.),—reciting, that “it had been found that the said West London Railway [which it appeared in evidence had been worked with *passenger* trains as well as with *goods* trains] could not be worked, as a separate and independent undertaking, with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connexion with the said London and Birmingham Railway and the said Great Western Railway, or either of them, by both or either of the companies to whom the said last-mentioned railways belonged; that the West London Railway Company were therefore desirous of letting the said railway on lease to the London and Birmingham Railway Company; and that the last-mentioned company were willing to accept such lease, subject to certain terms and conditions which had been mutually agreed on between the said two companies,”—the West London Railway Company was authorized to lease to the London and North-Western Railway Company their railway, and *all their rights, powers, and privileges in relation thereto*,—subject to the provisions of the act, and to the performance of the conditions to be mentioned in such lease.

By the lease, which was afterwards executed in pursuance of this act, the London and North-Western Railway Company covenanted, amongst other things, that they would “at their own expense, during the continuance of the lease, *efficiently work* and repair the railway and works thereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges, and expenses, claims, and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway or works; but the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham (North-Western) Railway Company of the West London Railway or works.”

Held, upon exceptions to the ruling of the chief justice of the Common Pleas, in an action of covenant by the West London Railway Company against the London and North-Western Railway Company for a breach of this covenant,—

1. That, in order to perform their covenant to work *efficiently*, the defendants were not bound under *all circumstances* to work the line for *passenger* traffic; but that, if as much gross proceeds could be obtained by *efficiently working* the railway for goods only, as for passengers only, or for both passengers and goods, the covenant was well performed,—PLATT, B., and MARTIN, B., not concurring.
2. That the agreement of February, 1837, with the Great Western Railway Company, was, by virtue of the provisions in the leasing act, and the lease itself, transferred to the defendants, the lessees; and, consequently, that they *had power* to compel the Great Western Railway Company to stop trains on their line pursuant to the provisions of that agreement.
3. That although the defendants had *power* to stop the Great Western trains, they were not bound to exercise it *necessarily* as a part of the efficient working of the line demised; and that they were not bound *necessarily* to work the demised line in connexion with the trains on the Great Western Railway.
4. That there was no covenant in the lease to bind the defendants to work the demised line in connexion with either or both their own or the Great Western Railway; but that it would be for the jury to say whether or not they could practically work the line *efficiently*, without some connexion with one or other of those railways.
5. That, for the purpose of considering the liability of the defendants, they were not to be treated by the jury as if they were lessees of a separate and independent line, having no control over the other two railways; but that the covenant to work the demised line *efficiently*, must be construed with a reference to the subject-matter, and the character of the defendants.

Held also, that the obligation of the defendants under their covenant was not limited,—as decided by the court below, ante, p. 319,—to the indemnification of the plaintiffs from the obligations cast upon them by their acts of incorporation:

And that the defendants were bound to work the railway *efficiently*,—so as to secure the stipulated benefits to the plaintiffs in the share of gross proceeds; but were not compelled to work it so as to produce the *largest* quantity of gross proceeds.

THE cause went down again for trial before JERVIS, C. J., at the sittings in London after Hilary term, 1852, when the counsel for the plaintiffs claimed *damages to the amount of 1s. on the first breach, 1s. on the second breach, 1s. on the third breach, 40s. 1d. on the fourth breach, and 41s. 2s. 2d. on the fifth breach,—which [*328

several sums it was admitted on the part of the defendants that they were entitled to recover.

*329] In support of the issue on the sixth breach, the *plaintiffs gave in evidence the statutes 5 G. 4, c. lxxv., 6 W. 4, c. lxxix., 1 Vict. c. lxxix., 3 & 4 Vict. c. cv., 8 & 9 Vict. c. clvi., and 9 & 10 Vict. c. cciv.

They then put in the agreement of the 4th of February, 1837,(a) an agreement of the 11th of March, 1845, between the West London Railway Company and the London and Birmingham Railway Company, and the lease of the 10th of March, 1846.(b) And they proved that the Great Western Railway, at a point between the termini thereof, crossed the West London Railway on a level,—being the crossing in the agreement with the Great Western Railway Company mentioned: that there was, and had always been since the commencement of the working of the West London Railway, a balk or stop kept across the West London Railway, by the Great Western Railway Company, except at certain periods during each day: that the West London Railway ran into and joined the London and North Western Railway (formerly the London and Birmingham Railway) at a point on the last-mentioned line between the termini thereof, being at Holsden Green, in the county of Middlesex, about five miles and three-quarters from London: that the West London Railway was about two miles in length, and was laid down with a single line of rails only, though a double line of rails might have been laid down, and there was sufficient land for that purpose included in the lease to the London and Birmingham Railway Company: that, before the demise of the West London Railway and works to the defendants, the plaintiffs worked the demised railway and works themselves, both for passenger traffic and goods traffic, and ran trains on the said line, and carried on the said line both passengers and goods, though to a very trifling extent: that the plaintiffs had only two locomotive *engines, two carriages, and five or
*330] six wagons: that the whole receipts were about 2*l.* per week: that, before the making of the said first-mentioned agreement, the West London Railway had been worked by the plaintiffs at a great loss to themselves; and that they had ceased to work the same: that, at the time of making the indenture of the 10th of March, 1846, and thence to the commencement of this action, there were four stations on, or belonging to, the said line, and being respectively parcel of the said demised premises,—the said stations being named respectively, the Kensington station, the Shepherd's Bush station, the Great Western Junction station, and the Holsden Green station, otherwise the London and North Western Junction station: that, at the said stations respectively, there were booking-offices (parcel of the same stations), and at the said stations and booking-offices respectively there was accommodation for booking

(a) Ante, p. 281.

(b) Ante, p. 270.

and receiving both passengers and goods to be carried on and along the said railway; and that, on the said demised railway and works, there was accommodation for receiving both passengers and goods, and carrying the same along the said railway.

The plaintiffs further gave evidence to prove, that, in the neighbourhood of the said line, and the stations thereof, a large population resided, and to show that many of them *would* have become passengers upon the line, if passenger trains had been run thereon and worked in connexion with trains on the London and Birmingham, and London and North Western, and Great Western railways, or some or one of them; and evidence to show that large quantities of goods *might*, after the making of the said lease, have been carried on the said West London line, if the same had been worked in connexion with trains on the said other railways, or some or one of them.

The plaintiffs further gave evidence, that the London *and Birmingham Railway Company before their dissolution by the act of [*331 9 & 10 Vict. c. cciv., and the defendants since their incorporation by that act, did not, nor did either of them, nor did any body or person, at any time run or provide passenger trains or carriages, or carry passengers, along or upon the said West London Railway, or keep open the stations or booking offices of the said railway, or any of them, for the purpose of receiving passengers to be conveyed on the said line, or advertise, or in any way make known to the public, that passengers might travel or be carried on the said line.

The plaintiffs' counsel then contended, that the said London and Birmingham Railway Company and the defendants had not, nor had either of them, *efficiently worked* the said West London Railway and works, and had not performed the covenant on which the sixth breach was assigned: and they contended, that, under the said covenant on which the said sixth breach was assigned, and in order to perform the same, it was necessary that the said London and Birmingham Railway Company, and the defendants, should work the said West London Railway and works (or that the said railway and works should be worked) for passenger traffic as well as for goods traffic; or that the said London and Birmingham Railway Company, and the defendants, should so work the said West London Railway and works (or that the same should be worked) for passenger traffic as well as for goods traffic, if such traffic presented itself: that the said London and Birmingham Railway Company, and the defendants, respectively, could and ought to have enforced against the Great Western Railway Company the said stipulations of the said last-mentioned company with the Birmingham, Bristol, and Thames Junction Railway Company, and could and ought to have compelled the said Great Western Railway Company to stop trains of the said Great Western Railway Company, for the purpose of *work- [*332 ing in connexion with the said West London line: that the said

London and Birmingham Railway Company, and the defendants, respectively, were bound to work the West London line (or that the same should have been worked) in connexion with trains on the Great Western Railway: that the London and Birmingham Railway Company, and the defendants, were *bound* to compel the Great Western Railway Company to stop trains on the Great Western Railway where necessary for the purpose of working in connexion with the West London line: that the said London and Birmingham Railway Company, and the defendants, respectively, were bound to work the West London line (or it was necessary that the said line should be worked) in connexion with trains on the line of the said London and Birmingham Railway Company and the defendants respectively: that the said London and Birmingham Railway Company, and the defendants, respectively, were bound to stop the trains of them the said London and Birmingham Railway Company and the defendants respectively, on the line of the London and Birmingham, and London and North Western railways, where necessary for that purpose.

The plaintiffs' counsel also contended that the said London and Birmingham Railway Company, and the defendants, respectively, were not to be treated, for the purpose of considering their liability under the said covenant on which the sixth breach was assigned, as if they were lessees of a separate and independent line, and having no control over the Great Western, and London and Birmingham, and London and North Western railways, or any of them. And the plaintiffs' counsel then prayed the chief justice to direct the jury in accordance with the said contentions.

The lord chief justice, after hearing the evidence aforesaid, and certain other evidence in the said cause, on the said trial, as to the capabilities *333] of the said railway, and *the mode in which the said railway had been worked for goods traffic, did then and there submit and leave the issue joined on the sixth breach to the jury aforesaid; and, in so doing, did declare and deliver his opinion to the jury aforesaid, that, under the said covenant on which the said sixth breach was assigned, and in order to perform the same, the said London and Birmingham Railway Company, and the defendants, respectively, were not bound to work the said West London line (nor was it necessary that the same should be worked) for passenger traffic, as well as for goods traffic;—that it was not necessary that the said London and Birmingham Railway Company, and the defendants, should work the said West London Railway and works, or that the same should be worked, for passenger traffic, as well as for goods traffic, if such traffic presented itself;—that the agreement of the 4th of February, 1837, was not transferred to the London and Birmingham Railway Company, or the defendants, or made binding between them and the Great Western Railway Company; and that therefore the London and Birmingham Railway Company, and

the defendants, respectively, had no power to compel the Great Western Railway Company to stop trains on the line of the Great Western Railway;—that the said London and Birmingham Railway Company, and the defendants, respectively, were not bound to work the West London line (and that it was not necessary that the same should be worked) in connexion with trains on the Great Western Railway;—that the said London and Birmingham Railway Company, and the defendants, respectively, were not bound to compel the Great Western Railway Company to stop trains on the Great Western Railway, where necessary for the purpose of working in connexion with the West London line;—that the said London and Birmingham Railway Company, and the defendants, respectively, were not bound to work the West London *line (and that it was not necessary that the same should [*334 be worked) in connexion with trains on the line of the said London and Birmingham Railway Company, and the defendants, respectively;—that the said London and Birmingham Railway Company, and the defendants, respectively, were not bound to stop the trains of the said London and Birmingham Railway Company, and the defendants, on the line of the London and Birmingham and London and North Western railways, respectively, where necessary for that purpose;—and that the said London and Birmingham Railway Company, and the defendants, respectively, must be treated by the jury, for the purpose of considering their liability under the said covenant, as if they were lessees of a separate and independent line, having no control over the Great Western, and London and Birmingham, and London and North Western railways, or any of them.

To this direction the counsel for the plaintiffs excepted.

The jury returned a verdict for the defendants on the issue on the sixth breach; and, on the other breaches respectively, they assessed the several damages so claimed and assented to as before mentioned.

Judgment having been entered pursuant to the above assessment and finding, the record and bill of exceptions were removed by writ of error to the Exchequer Chamber.

The case was argued on the 26th and 27th of November, 1852, before PARKE, B., WIGHTMAN, J., COLERIDGE, J., ERLE, J., PLATT, B., MARTIN, B., and CROMPTON, J.

Byles, Serjt. (with whom was *Aspland*), for the plaintiffs in error.—The recital in the 1st section of the plaintiffs' act of incorporation, 6 W. 4, c. lxxix., shows that the legislature contemplated a great public advantage in the opening of an additional, certain, and expeditious communication between the London and Birmingham and the Great Western railways, and the south western *districts of the metropolis and the river Thames: the 33d section recites that it is intended [*335 that the railway by that act authorized to be made, shall communicate with those railways; and the 150th and 152d sections show that *pas-*

passenger traffic, as well as goods traffic, was intended to be provided for. The West London Railway Company having obtained a conveyance of the fee-simple of certain land over which it was essential that the Great Western Railway Company should have an easement, an agreement was entered into between these two companies on the 4th of February, 1837, for the purpose of carrying into effect the recited objects of the 6 W. 4, c. lxxix., and of regulating the passage of the trains of the two companies at the point where they intersected each other. Under this agreement, the Great Western Railway Company bound themselves to erect a station for the accommodation of passengers at that point, and to stop certain of their trains for the purpose of enabling passengers and goods to be transferred from or to the trains upon the plaintiffs' line. In July, 1840, an act was passed,—3 & 4 Vict. c. cv.—to change the name of the plaintiffs' company. The agreement with the Great Western Railway Company is referred to and confirmed in the 34th, 35th, 36th, and 37th sections of that act,—making it in fact a statutory agreement. It appeared from the evidence, that the West London Railway was adapted to, and had actually been used by the plaintiffs for, the conveyance of both passengers and goods, although, from the unfavourable position in which they were placed, they had been unable to work it advantageously. Under these circumstances it was that the leasing act, 8 & 9 Vict. c. clvi., was passed. By the lease made in pursuance of that act, the plaintiffs, instead of reserving a rent, stipulated to receive a certain proportion of the gross receipts in respect of passengers, goods, and other things carried or landed on the West London Railway, and a certain *proportion of the net profits arising
 *336] from tolls. It was to meet the peril of the traffic being diverted to the Euston Square terminus, that this covenant efficiently to work the railway was inserted.

Upon the first trial, the lord chief justice ruled that the lessees were bound to work with passenger as well as with goods trains. The Court of Common Pleas, however, held that they were not bound so to work the railway, and, in consequence of a suggestion thrown out by MAULE, J., in the course of the argument, that the first part of the covenant was restrained by the last, and that it had reference to the 210th section of the 6 W. 4, c. lxxix., and amounted to a mere covenant of indemnity.

Upon the second trial, the lord chief justice declined to rule, in conformity with the above suggestion, that the covenant upon which the sixth breach was framed was only an indemnity against forfeiture: but he told the jury that the lessees were not bound to work the railway for passenger traffic as well as for goods traffic. It is submitted that that direction was erroneous, and that the true meaning of the covenant, is, that the lessees shall use all ordinary and reasonable means to secure and to increase the traffic of the railway in both its branches, and that

they shall at all events work up to the fair requirements of the public. It is to be observed that both the lessors and the lessees were at the time of the making of this lease, carriers of passengers and of goods: and the fair inference, even if the lease were altogether silent upon the subject, would be, that the parties contemplated that the business of the railway was to be carried on as before. The lease, however, is not silent: many of its provisions point most clearly to passenger traffic. The lessees are bound by all reasonable means to take order that passenger traffic shall be had. It is enough, however, to say that they are bound to work the railway for passenger traffic, if such traffic presented itself.

*The third branch of the ruling is also exceptionable. The fee-simple of the land over which the West London Railway passes [*337 belongs to the plaintiffs. The Great Western Railway Company have an easement over it, which they are bound to exercise in a particular manner; the reservation of the right to stop their trains being in the nature of a condition annexed to the easement. If the power to compel the Great Western Railway Company to stop their trains in the manner provided by the agreement, is not conveyed to the defendants, the consequence will be, that the former get the easement, and are relieved from the burthens attached to the exercise of it. It will be said that the right of compelling the stoppage of trains under the agreement, is one that is not transferable, and does not run with the land. It is submitted, however, that the rights and duties created by that agreement are of such a nature that both the benefit and the burthen would run with the land, independently of any aid to be derived from the acts of parliament. Suppose the plaintiffs had sold the land to a private person, would the Great Western Railway Company lose their easement? And, if the benefit would survive, will not the burthen survive too? The circumstance of this being a demise for a term of years, and not a conveyance of the fee, will not, it is conceived, make any difference in this respect. But, if any doubt could exist, it is removed by the statutory sanction which this agreement has received (see the 3 & 4 Vict. c. cv., ss 34, 35, 36, 37, and the 10 & 11 Vict. c. xci., s. 43), and by the 8 & 9 Vict. c. clvi., which expressly enables the plaintiffs to demise to the defendants all their rights, powers, and privileges in relation to the railway: and it cannot be denied, that, among these rights and privileges, is the right conferred upon the plaintiffs by the agreement of the 4th of February, 1837. That the lessees might sue *at law* for a breach of that agreement, may perhaps admit of doubt: but none *can exist that they might obtain relief *in equity* in [*338 the names of the lessors.

The next proposition laid down by the lord chief justice, was, that the defendants were not bound to work the railway in question in connexion with trains of the Great Western Railway Company, or to compel

that company to stop their trains, where necessary, for the purpose of working in connexion with the demised line. It is impossible for the defendants, in the teeth of the recital in the 8 & 9 Vict. c. clvi., s. 1,—"that it has been found that the said West London Railway cannot be worked, as a separate and independent undertaking, with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connexion with the said London and Birmingham Railway and the said Great Western Railway, or either of them, by both or either of the companies to whom the said last-mentioned railways belong,"—successfully to contend that they *efficiently* work the demised line, when they work it in a manner which the legislature has declared to be unproductive of advantage to the proprietors of the undertaking.

The same observations will equally apply to the direction which forms the subject of the sixth and seventh exceptions.

The next proposition of the lord chief justice, is, that, for the purpose of considering their liability under the covenant in question, the defendants are to be treated as if they were lessees of a separate and independent line, having no control over the Great Western and London and North Western railways, or either of them. That direction, it is submitted, is manifestly erroneous. The subject-matter of the demise is, a complicated arrangement of machinery, which was powerless in the hands of the lessors: and the lessees are a powerful company, possessing unbounded resources and means of making *all
*339] that machinery in the largest possible extent useful and available. The case clearly falls within Lord Bacon's 10th maxim,—"*Verba generalia restringuntur ad habilitatum rei vel personæ*,"—upon which the learned author observes: "All words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter or person. As, if I grant to J. S. an annuity of 10*l.* a year *pro consilio impenso et impendendo*, if J. S. be a physician, it shall be understood of his counsel in physic; and, if he be a lawyer, of his counsel in law. So, if I do let a tenement to J. S., near by my dwelling-house in a borough, provided that he shall not erect or use any shop in the same without my license, and afterwards I license him to erect a shop, and J. S. is then a miller, he shall not by virtue of those general words erect a joiner's shop."

Suppose it to be doubtful whether the covenant in question does or does not include a working with passenger trains, or working in connexion with the Great Western and London and North Western railways, Lord Bacon's 3d maxim already referred to, (a)—"*Verba fortius accipiuntur contra proferentem*,"—applies. If there be any ambiguity, it is against the covenantors that it should operate.

It was suggested in the judgment in the court below, that the cove-

(a) *Ante*, p. 309.

nant efficiently to work and repair the railway and works demised, is qualified and restrained by the concluding words,—“and indemnify the West London Railway Company against all liabilities, loss, charges and expenses, claims, and demands whatsoever, incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway and works.” This *argument is based upon the 6 W. 4, c. lxxix., s. 210, and the 3 & 4 Vict. c. cv., s. 37,—the combined effect of [*340 which is, that, if the West London Railway shall be abandoned, or cease to be used as a railway, the land shall revert to the owners of the adjoining lands, unless the Great Western Railway Company shall tender the price of the land, and then it shall become theirs. This can hardly have been the intention of the parties, when the point never occurred to either of them, or to their counsel, until suggested by MAULE, J., upon the second argument in the court below. But for the clause of indemnity, there could be no reasonable doubt as to the meaning of the covenant. And the clause of indemnity cannot control the express covenant in the way contended. *Saward v. Anstey*, 2 Bingham 519 (E. C. L. R. vol. 9), 10 J. B. Moore, 55 (E. C. L. R. vol. 17), is precisely in point. There, the defendant purchased an estate charged with an annuity to M. S., and, as part of the bargain, covenanted to pay the annuity, and to indemnify the vendor against any charge in respect of it. A declaration on this covenant, alleging for breach non-payment of this annuity, without adding that the vendor had been thereby damnified, was held sufficient, on demurrer. And BEST, C. J. said: (a) “I agree, that, in construing this covenant, we are to look to the subject-matter of the contract, and to consider all the terms of the deed: I admit that a positive covenant may sometimes be controlled or qualified by other clauses in the deed. It has been insisted that the clause of indemnity controls this covenant. It cannot be said that it is to control; if it is to have any effect at all, it must erase the covenant to pay the annuity for the deed. The plaintiff himself could not be damnified by non-payment. If, therefore, the clause of indemnity were to limit the covenant for payment to cases where the plaintiff was *himself damnified by non-payment, it would destroy its effect [*341 altogether. When there is a positive general covenant in a deed, that covenant is not to be controlled by subsequent clauses, unless, as Lord ALVANLEY says, in *Hesse v. Stevenson*, 3 B. & P. 565, ‘the inference is irresistible that the parties could not intend to make a general covenant.’ I cannot infer from this deed that it was the intent of the parties to restrain or qualify the positive covenant to pay. The covenant for indemnity is useless, but *utile per inutile non vitiatur*.” If this were a covenant in the alternative,—to work, or to indemnify,—it might present more difficulty. [COLERIDGE, J.—Effect-

(a) 2 Bingham 522 (E. C. L. R. vol. 9.)

ally working would be otiose, if the forfeiture were the only thing to be provided against.] Exactly so.

Channell, Serjt. (with whom was *Bovill*), for the defendants in error.—The direction of the lord chief justice is in accordance with the unanimous opinion of the Court of Common Pleas, and is in all respects correct. Three principal points were made on the part of the plaintiffs,—first, that the defendants were bound, under any circumstances, and in any event, to run passenger trains on the West London Railway,—secondly, that they were bound to enforce against the Great Western Railway Company the agreement of the 4th of February, 1837, as to the stopping of their trains,—thirdly, that the defendants were bound to work the West London Railway in connexion with their own line and with the Great Western Railway. On the other hand, the defendants insisted that it was not essential to the performance of their covenant efficiently to work, that the demised line should be worked with *passenger* trains: and they proved, that the most profitable mode of working it *342] was with goods trains; and that, from the circumstance of the *railway consisting of a single line of rails only, it would have been inconvenient, and almost impracticable, to work it with both passenger trains and goods trains.

1. The covenant does not in terms require the defendants to run passenger trains, or goods trains. They are to work the railway efficiently. It is conceded that that does not imply that they are so to work as to insure the largest possible amount of gross receipts. They perform their contract, if they work the line according to the reasonable exigencies of the public. The word “efficiently” has in truth no meaning at all. [COLERIDGE, J.—Must you not, in construing this lease, consider what were the obligations which the West London Railway Company were under, by their act of incorporation, as to the conveyance of passengers?] The only obligations they were under to the public, were, to complete the railway, and to keep it in repair. If, by any act or omission of theirs, the West London Railway Company incurred damage or loss, the defendants might be responsible under this covenant. But this lease is to be construed, not with reference to any supposed interest of the public, but only with reference to what may be supposed to have been the intention of the contracting parties. [PLATT, B.—Do you contend, that, if the railway could not have been profitably worked either with passenger trains or goods trains, the defendants are excused from the performance of their covenant?] There might be some difficulty in contending for that. They are probably bound to work the line while gross receipts can be realized. But the lessors are not entitled to insist upon any particular mode of working, for the purpose of increasing the gross receipts. The 85th section of the 6 W. 4, c. lxxix., shows that the legislature contemplated the possibility of the railway being abandoned or disused.

2. The 3 & 4 Vict. c. cv., it is true refers to and recognises the agreement of the 4th of February, 1837, between *the plaintiffs and the Great Western Railway Company. But, at the time that [*343] act passed, no agreement with the defendants was contemplated. And it is referred to solely for the purpose of remedying certain omissions in the former act, and more effectually providing for the safety of the public. The leasing act, 8 & 9 Vict. c. clvi., and the lease itself, are both totally silent on the subject of the agreement. The provisions of the agreement are of a very special character. It imposes penalties on both parties. If the argument on the other side is correct, that the rights, powers, and privileges of the West London Railway Company under that agreement are transferred to the defendants by the lease, what becomes of their liabilities? Are *they* also transferred to the defendants? If the intention of the parties had been to clothe the lessees with all the powers which the lessors had under the agreement, one would naturally expect that some expression of that intention would somewhere appear. [MARTIN, B.—Surely the London and North Western Railway Company would have a right to sue the Great Western Railway Company for any breach of that agreement, in the name of the West London Railway Company.] It is confidently submitted that they would not. And the Court of Common Pleas certainly thought otherwise. [MARTIN, B.—Was it not a “right” of the West London Railway Company in reference to the railway?] The lessees were to take all the rights and powers of the lessors with reference to the extension and completion of the unfinished railway which was the subject of the lease. If the lessors were intended to take all the rights and powers of the lessees as against the Great Western Railway Company, it is singular that neither the leasing act of 8 and 9 Vict. c. clvi., or the lease itself, makes the slightest allusion to it. [MARTIN, B.—I think there can be little doubt as to the intention of the *legislature. COLE- [*344] RIDGE, J.—If you are to suppose the lessors’ rights under the agreement not to be transferred to the lessees, you suppose the legislature to be extinguishing the agreement, without the assent of the Great Western Railway Company; whereas, it might be for the benefit of the Great Western Railway Company to enforce it.] The state of things existing and contemplated at the time of the passing of the 8 & 9 Vict. c. clvi., rendered it quite unimportant to all parties whether the agreement subsisted or not. But, whether it still subsists or not, it is quite clear that the defendants have no means of enforcing it. [MARTIN, B.—The 34th section of the 3 & 4 Vict. c. cv., look very like a permanent agreement.] The 3d section of the 8 & 9 Vict. c. clvi., is inconsistent with that view, and would have been quite unnecessary if the plaintiffs’ right under the agreement remained.

3. Assuming that the defendants were not bound to run passenger trains, and had no power to stop the trains on the Great Western Rail-

way, the next question is, whether they were bound to work the West London Railway in connexion with their own line. The lease contains nothing which in terms requires them to do so. The act recites, not that the line intended to be leased *can*, but that it *might* be worked advantageously in connexion with the other railways; and it explains the way in which the legislature thought fit to give the parties the powers they sought. [COLERIDGE, J.—The parties represent to the legislature,—and these allegations are *proved*,—that it may be beneficial to work the West London Railway in connexion with the London and Birmingham and Great Western railways, or either of them: and then you say that a lease is made which is quite at variance with those representations. It is found that the West London Railway cannot be worked,—not *345] *by the company themselves, but by any one*,—as a separate and independent undertaking, with advantage to the proprietors; but that it might be advantageously worked in connexion with the other railways mentioned. PARKE, B.—The question still is, what is the meaning of this covenant? It may be that the legislature has been imposed upon: but that is immaterial. PLATT, B.—Reading the lease as if the act of parliament was recited in it, does not the covenant efficiently to work the railway mean working it with this new combination of rails?] That, it is submitted, would be giving a construction to the instrument which the language of the parties does not warrant.

Aspland, in reply.—The language and intention of the parties are clearly not satisfied by construing the covenant in question as a covenant of indemnity only. [PARKE, B.—We have not much doubt about that. It clearly is not confined to a mere indemnity.] Then, the agreement with the Great Western Railway Company is still operative, and might be enforced by the defendants, at all events in equity, in the name of the West London Railway Company. If it were not a subsisting agreement, what becomes of the stipulation as to the closing of the barriers at the point of intersection? (a) The clause of forfeiture (s. 210) in the 6 W. 4, c. lxxix., is altered and modified by the 3 & 4 Vict. c. cv., s. 37. As to the duty of the defendants to work the demised line in connexion with their own line and that of the Great Western Railway,—the court will not assume that the allegations made to parliament, as recited in the preamble to the leasing act of 8 & 9 Vict. c. clvi., are false.

Cur. adv. vult.

*346] *PARKE, B., now delivered the judgment of the court:—
This case comes before us upon a bill of exceptions to the ruling of the lord chief justice of the Common Pleas, on the trial of an action of covenant brought by the plaintiffs against the defendants.

The questions arising on the construction of that covenant, we are informed, had been before the Court of Common Pleas, upon cross-motions by the plaintiffs and the defendants; and the ruling was in

(a) 9th stipulation, ante, p. 289.

conformity with, or rather was, the ultimate opinion of the court, though necessarily, on the record, it is treated as the ruling of my lord chief justice.

The questions arising on the record were fully and most satisfactorily argued, on both sides, before us; and I have now to state the opinion of my brethren and myself on each of them.

The action is brought on a covenant contained in a lease by the plaintiffs to the London and Birmingham Railway Company, which has since been incorporated with, and had its liabilities transferred to, the defendants. The lease was made the 10th of March, 1846, pursuant to an act of 8 & 9 Vict. c. clvi., for enabling the London and Birmingham Railway Company to take a lease of the West London Railway. The West London Railway Company had, under its then name of the Birmingham, Bristol, and Thames Junction Railway Company, and under an act of the 6 W. 4, c. lxxix., made a railway from the basin of the Kensington Canal, at Kensington, to join the defendants' railway, and also the Great Western Railway, near Holsden Green; and there was in that act of parliament a clause,—s. 210,—providing, that, if the railway, or any part thereof, should be abandoned or given up, or if, after it was completed, it should for the space of three years cease to be used as a railway, the lands purchased for the purposes of the act should *re-vest in the owners for the time being of the [*347 adjoining lands.

In the progress of the works of the plaintiffs and the Great Western Railway Company, they became competitors for the purchase of a small piece of land belonging to the Bishop of London, over which both railways would have to pass: and an agreement under the seal of both companies was executed, dated the 4th of February, 1837, which recited the above fact, and also that the bishop had conveyed the land to the company now the plaintiffs, subject to the right of the Great Western Railway Company to construct their railway across it; and the deed contains mutual covenants regulating the rights of each company in respect of the piece of land so conveyed. The Great Western Railway Company covenant with the company now the West London Railway Company to construct a railway station at the point of junction, for the purpose of transferring passengers and goods from one railway to the other, and to stop their trains for the purpose of meeting corresponding trains of that company, in the manner particularly detailed in the deed.

In the year 1840, another act, the 3 & 4 Vict. c. cv., passed, giving further powers to the company now the plaintiffs; and in the 34th section, that act recites the agreement of the 4th of February, 1837, regulates the mode of crossing until the plaintiffs' railway should be completed, saves the plaintiffs' rights under the agreement by s. 36, and by s. 37 provides, that, if the plaintiffs' line is abandoned, or ceases to be

used as a railway for three years after its completion, then, on payment or tender to them of the purchase-money of the piece of land mentioned in the agreement, that land should vest in the Great Western Railway Company.

In July, 1845, the London and Birmingham Railway Company, having previously agreed with the plaintiffs to take a lease of their railway, *348] obtained an act of *parliament, the 8 & 9 Vict. c. clvi., to enable them to take that lease. That statute recites that it had been found that ~~the~~ West London Railway (which name was given to the plaintiffs' railway by the 3 & 4 Vict. c. cv.) *could not be worked*, as a separate and independent undertaking, *with advantage* to the proprietors thereof; but the same might be advantageously worked and used in connexion with the London and Birmingham Railway and the Great Western Railway, or either of them, by either of the companies to whom those railways belong; power is given to the West London Railway Company to lease to the London and Birmingham Railway Company their railway, stations, &c., *and all their rights, powers, and privileges in relation thereto*; and it is declared to be lawful for the London and Birmingham Railway Company to accept such lease, and to use, exercise, and enjoy all such rights, powers, and privileges as aforesaid, subject to the provisions of that act, and to the performance of the conditions in the lease.

Pursuant to this act, the lease from the plaintiffs to the London and Birmingham Railway Company was executed on the 10th of March, 1846, upon a covenant in which the present action is brought against the London and North Western Railway Company.

This indenture, reciting the act, witnesses, that, in consideration of 60,000*l.* paid by the London and Birmingham Railway Company to the plaintiffs, the plaintiffs, in pursuance of the said power, did grant, demise, and lease unto the London and Birmingham Railway Company, the West London Railway and all stations, wharfs, buildings, and appurtenances thereto belonging, or held, used, or enjoyed therewith, and the rates and tolls payable in respect thereof, together with *all the rights, powers, and privileges of the West London Railway Company in relation thereto*; and also the free and uninterrupted use of the *349] Kensington Canal, for the *purposes of the traffic of the London and Birmingham Railway Company on the West London Railway: and it was agreed, that, during the continuance of the lease, the London and Birmingham Railway Company should, within twenty-one days after the 30th of June and 31st of December in every year, carry to the credit of the West London Railway Company such a sum of money as should be equivalent to one fourth part of the gross sums received by the London and Birmingham Railway Company, during the period of six calendar months next immediately preceding the said 30th of June and 31st of December, in respect of passengers, goods, and

other things carried or landed on the Wes; London Railway, or the lands and appurtenances thereto belonging, or on or over any alterations and improvements in any of the premises demised, or in lieu of, or by way of substitution for, any part thereof: and also such a sum of money as should be equivalent to one-half of the net profits arising from the rates, tolls, and duties to be received for the use of the same respectively, from persons providing their own locomotive or other moving power, or carriages. Then follows the material covenant upon which this question turns. It is in these terms:—That the London and Birmingham Railway Company should, at their own expense, during the continuance of the lease, *efficiently* work and repair the railway and works demised, and indemnify the West London Railway Company against all liabilities, loss, charges, and expenses, claims, and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway and works; but the West London Railway Company should have no control whatever over the working or management by the London and Birmingham Railway Company of the West London Railway or works.

*Several breaches were assigned, to which it is not material to advert. The sixth was, that the defendants did not efficiently [^{*350} work the said railway; to which the defendants pleaded that they *did* efficiently work it: and on that issue the lord chief justice directed the jury.

The only question for us to decide, is, whether the direction of my lord chief justice was right in all the particulars pointed out in the bill of exceptions.

There were several objections; and we propose to give our opinion upon each; for, though, if we decided that one only was wrong, a *venire de novo* must be granted, it would leave the case in a very unsatisfactory condition, and prolong a litigation which it is very desirable if possible to terminate, by laying down a rule which may lead the parties to settle the proper damages to be paid, by arbitration.

The objections are, that the lord chief justice was wrong in stating his opinion to the jury on the following eight particulars,—*First*, that, under the said covenant, and in order to perform the same, the defendants were not bound to work the said West London line (nor was it necessary that the same should be worked) for *passenger* traffic, as well as for goods traffic,—*Secondly*, that it was not necessary that the defendants should work the said West London Railway and works, or that the same should be worked, for *passenger* traffic, as well as for goods traffic, *if such traffic presented itself*,—*Thirdly*, that the said agreement of the 4th of February, 1837, was not transferred to the defendants, or made binding between them and the Great Western Railway Company, and that therefore the said defendants had *no power*

to compel the Great Western Railway Company to stop trains on the line of the Great Western Railway,—*Fourthly*, that the defendants were not bound to work the West London line (and that it was not *necessary* that the same should be worked) in connexion with trains on *351] *the Great Western Railway,—Fifthly*, that the said defendants *were not bound* to compel the Great Western Railway Company to stop trains on the Great Western Railway, where necessary, for the purpose of working in connexion with the West London line,—*Sixthly*, that the defendants were not bound to work the West London line (and that it was not necessary that the same should be worked) in connexion with trains on the line of the said defendants,—*Seventhly*, that the said defendants were not bound to stop the trains of the said defendants on the line of the London and Birmingham and London and North Western railways respectively, where necessary, for that purpose,—*Eighthly*, that the defendants must be treated by the jury, for the purpose of considering their liability under the said covenant, as if they were lessees of a separate and independent line, having no control over the Great Western, and London and Birmingham, and London and North Western railways, or any of them.

It was suggested to us, on the argument, that, in giving this opinion, the lord chief justice acted in some degree on the principle which is stated to us to have been sanctioned by most of the judges of the Court of Common Pleas,—and of whose opinions we have been furnished with a printed report, but not from the regular reporter of that court. The principle suggested, is, that, taking the whole of the covenant together, the main object of it was, that the railway was to be worked so as to prevent any loss or forfeiture or injury to the plaintiffs in consequence of not working; but, as long as that is done, it might be worked in any way that the lessees pleased,—that the lessees merely took on themselves the obligations of the lessors, and undertook to relieve them from the obligations cast upon them by their acts of parliament.

*352] But the able argument of my Brother *Byles* satisfied *us that this was too narrow a view of the construction of the covenant in question; and we so intimated our opinion in the course of the argument. Had the object been merely to protect the plaintiffs from the forfeiture of the line, under one of the clauses already referred to,—either under the 6 W. 4, c. lxxix., s. 210, by abandoning or giving up the line, or ceasing to use it as a railway, or under the 3 & 4 Vict. c. cv., s. 37, by abandoning or ceasing to use it for three years,—it would have been unnecessary to do more than to covenant not to abandon or give up or cease to use the railway. The covenant to indemnify against all liabilities, losses, charges, expenses, claims, and demands in consequence of *any want of repair*, or in any manner connected with the working of the railway and works,—and more especially, the covenant to work *efficiently*,—would have been quite unnecessary, if the

object had been merely to preserve the railway to the plaintiffs' company. We must give effect to all the words of the covenant, if we can; and, so doing, we do not think that the obligation can be limited in the way which has been suggested.

The railway is to be worked *efficiently*, and *efficiently* repaired; and the plaintiffs are to share in the gross receipts, in the proportion of one-fourth, and in half the net profits of the rates and tolls payable by others using their own locomotive power. This shows that the object of the covenant to work *efficiently*, was, to secure the stipulated benefit to the plaintiffs in the gross receipts, and *efficiently* to repair, to give them the chance of a share of the net profits: but we agree with the reported judgment of my Brother MAULE, that it never could have been intended that the defendant's company was to work the railway in such a manner as to produce the *largest* quantity of gross receipts. That might entail a ruinous loss on themselves. They were not bound to lay down a double rail where a single one was before, or *to [*353 apply a part of their large capital to the erection of new stations, or to disarrange all their plans, so as to make the plaintiffs' line of railway productive, at the expense of their own. A fair and reasonable mode of working the railway, so as to make it productive, is all that can be required.

We now proceed to consider the eight points made by the bill of exceptions,—keeping these observations in view.

The first of these depends upon the question whether the defendants were, *under all circumstances*, in order to perform the covenant to work *efficiently*, bound to work the line for passenger traffic. We,—with the exception of my Brothers PLATT and MARTIN, who are not satisfied to concur on this particular point, though they concur on all others,—think this proposition cannot be maintained. A satisfactory criterion of the truth of it was offered by my Brother Channell, when he asked whether it would be a good breach of such a covenant, to state simply that the defendants did not work the railway with passenger traffic. We,—with the exception of my Brothers PLATT and MARTIN,—think it clearly would not. If as much gross receipts could be obtained by *efficiently* working the railway for goods only, as for passengers only, or for both passengers and goods (and there is no evidence stated that it could not), surely the plaintiffs had no right to complain. The mixture of the two on a railway with a single line might be very inconvenient, or even dangerous. We therefore think that the first objection cannot be maintained.

The second is of the same nature. It seems a stronger thing to assert that they are not bound to carry passengers, even if passenger traffic presented itself: but, in truth, the same answer is to be given,—that, if they work the railway *efficiently* for goods, so as to produce as

*354] much gross receipts as the railway, when worked for *passengers and goods, or passengers alone, would produce, they perform their contract. The *mode* of working the railway, is entirely in their discretion.

The third question is, whether the chief justice was right in his opinion that the agreement of the 4th of February, 1837, was not transferred to the defendants, and that therefore the defendants *had no power* to compel the Great Western Railway Company to stop trains on their railway, pursuant to their covenant contained in that agreement. We think that this covenant to make a station on certain land, and to stop the trains there,—which affects the value of the land, and of the whole of the plaintiffs' railway,—is one which runs with the estate in that railway; and that the assignee of the whole estate in the railway could sue upon the covenant at common law. Whether the assignees of that estate for a term of years,—as the defendants are,—could sue at common law, is a point which has not been settled; the cases on the subject being generally those of covenants for title, which pass with the entire estate: (a) but, as this is a covenant affecting the temporary enjoyment of the estate, and consequently beneficial to the owners of it *pro tempore*, there is no reason why it should not; as in the case of covenants affecting the reversion, which are transferred with part of the reversion, or the reversion of part, by operation of the statute 32 H. 8, c. 34: Co. Litt. 215 a; Twynam v. Pickard, 2 B. & Ald. 105. At all events, we think that the words of the statute 8 & 9 Vict. c. clvi., and of the lease, are sufficient to vest the rights under the agreement in the defendants, as, not only the railway, but all the *rights, powers, and privileges* of the plaintiffs in relation thereto, are demised by the plaintiffs to the defendants, and this is a power and privilege which does *355] *relate to the railway. For these reasons, we do not agree in the opinion of my lord chief justice on the third question, that the defendants had *not power* to compel the Great Western Railway Company to stop trains on the line of the Great Western Railway; and that part of his direction we think wrong.

The fourth and fifth objections admit of a different answer; and the direction was right, on the same principle that the first and second were. Although they had *power*, they were not bound to exercise it *necessarily* as a part of the efficient working of the railway by the defendants; and the defendants were not bound *necessarily* to work the West London Railway in connexion with trains on the Great Western, as a part of their obligation to work efficiently. It would not have been a good breach of their covenant, to allege simply that they did not so work the line.

Precisely the same observation is to be made on the sixth and seventh objections. There is no covenant in the lease obliging the defendants

(a) See the authorities collected in the notes to Spencer's case, 1 Smith's Leading Cases, 22, 33.

to work their line in connexion with either in particular, or with both the Great Western and London and North Western lines together; though it is difficult to see how, practically, they could work the lines *efficiently*, without some connexion with one or the other. This would be for the jury: and, if the jury found that they could work the line efficiently without, so as to satisfy their covenant, that would be sufficient.

The last position laid down by the chief justice, is, that the defendants must be treated by the jury, for the purpose of considering the liability of the defendants, as if they were the lessees of a separate and independent line, having no control over the Great Western and London and North Western Railways. We do not think that this proposition is correct.

The covenant to work efficiently must be construed *with a reference to the subject-matter, and the character of the defendants. The maxim of Lord Bacon quoted by my Brother *Byles*, as giving one of the rules for the construction of instruments, applies to this case,—“*Verba generalia restringuntur ad habilitatem rei vel personam:*” and the word “efficient” must admit of a different construction in a covenant by a person armed with very limited, or very extensive powers. [*356]

If this railway had been leased to a simple individual, or company, without any connexion with any other railway, and leased alone, the measure of efficient working, we cannot help thinking, would be very different from what would be required from a company whose line was connected with it, who had the entire control over their own line, and were armed with a power of adding to the traffic of the railway, by the control possessed over another line, and whose capabilities and powers in this respect were reasons which disposed parliament to permit the lease to be made to them.

It is difficult, indeed almost impossible, to define the precise nature and degree of efficient working, which such a company ought to apply, under this covenant: not so difficult to say that it ought to be different and greater than would be required from a company or an individual who had nothing but the railway leased. *They* could only be required to supply convenient accommodation and attendance for the receipt, and sufficient means of carriage, of such goods and passengers as might be offered at one terminus, or an intermediate station, to be carried to the other terminus, or some other intermediate station; and this however small the gross receipts might be.

But that would be too small a measure of efficient working, in the case of these defendants, who have the power of supplying more goods and passengers themselves, by facilitating the transit of both from Holsden to *the Kensington terminus or Great Western station, or by increased facilities for receiving them at the Kensington [*357]

terminus, by arrangements within their power, without any serious injury to their own concern.

They are certainly not bound to make a sacrifice of their own concerns, for the purpose of efficiently working this line, so as to produce the greatest profit to the plaintiffs and themselves.

The covenant must have a reasonable construction in this respect. But they are, we think, bound to do more than a lessee of merely the railway in question would do, unconnected with any other.

For these reasons we think there must be a *venire de novo*.

Venire de novo.(a)

(a) Upon this judgment, it is understood that the opinion of the House of Lords will be taken.

*358] *LAMBERT and Others v. SMITH. June 14.

Assumpsit on a bill of exchange for 30*l.*, drawn by A. B. upon C. D. on the 16th of February, 1849, payable to E. F. or order, thirty-five days after date. Plea, a discharge of the acceptor under the insolvent debtors act. In support of the plea, the defendant put in his schedule, which contained the following description of *the original debt*:—"A. B. Debt, 30*l.*; 20*l.* money lent, 10*l.* clothes. I gave my acceptance to a bill drawn by him, 16th February, 1849, at thirty-five days:"—Held, that the adjudication under the act was no discharge as to the claim of E. F. upon the bill, under the 1 & 2 Vict. c. 110, s. 75.

And *semble*, that the description of the debt was not a full and true description under s. 69.

THIS was an action of assumpsit upon a bill of exchange for 30*l.* drawn by one John Simons on the 16th of February, 1849, upon and accepted by the defendant, and payable thirty-five days after date to the plaintiffs or order.

The defendant pleaded, that he did not make the bill, and a discharge under the insolvent debtors act, 1 & 2 Vict. c. 110.

At the trial, before JERVIS, C. J., at the sittings in London after the last term, it appeared that the bill in question was presented by a clerk of the plaintiffs for acceptance, that the defendant accepted it, and that it had ever since remained in the hands of the plaintiffs.

For the defendant, an examined copy of the schedule filed by him in the insolvent debtors court, and of the order of adjudication thereon, were put in. The debt for which the bill had been given was thus described in the schedule:—

"John Simons. Debt, 30*l.* Contracted, 1846, to 1849. Admitted. 20*l.* money lent; 10*l.* clothes. I gave my acceptance to a bill drawn by him, 16th February, 1849, at thirty-five days."

No mention was made of the plaintiffs as the holders of the bill; nor was there any allegation that the holders were unknown.

On the part of the plaintiffs, it was insisted that there was no such
*359] description of this debt in the schedule, as *to make the defendant's discharge under the act available as against the plaintiffs;

and the lord chief justice, being of this opinion, directed a verdict for the plaintiffs, with liberty to the defendant to move to enter a verdict for him on the second issue, if the court should think the description sufficient.

Hawkins, on a former day in this term, obtained a rule nisi accordingly —He cited *Reeves v. Lambert*, 4 B. & C. 214 (E. C. L. R. vol. 10). There, the defendant, being indebted to A. for goods sold, accepted a bill drawn by A. for the amount, which became due in October, 1823. Before that time the defendant became insolvent, and presented his petition to be discharged; and in his schedule delivered into the insolvent debtors court, he stated that he was indebted to A. for goods, and that A. held his acceptance for the amount, which became due in October, 1823. A. had endorsed the bill to B., but the insolvent was ignorant of that fact. B. having brought an action against the insolvent upon the bill, the latter pleaded his discharge under the insolvent debtors act: and it was held that the schedule contained a true description of the person to whom the insolvent was indebted, within the meaning of the statute 1 G. 4, c. 119, s. 6.

Phipson now showed cause.—The question turns upon the 75th section of the 1 & 2 Vict. c. 110, which enacts, “that, after such examination of any such prisoner as hereinbefore (s. 72) directed, it shall be lawful, at such hearing, or adjourned hearing, as aforesaid, for the said court, or commissioner, or justices, upon such prisoner’s swearing to the truth of his schedule, and executing such warrant of attorney as is hereinafter (s. 87) directed, to adjudge that such prisoner shall be discharged from *custody, and entitled to the benefit of this act, [*360 at such time as the said court, or commissioner, or justices shall direct, in pursuance of the provisions hereinafter (ss. 76, 77, 78) contained in that behalf, as to the several debts and sums of money due, or claimed to be due, at the time of making such vesting order as aforesaid, from such prisoner to *the several persons named in his schedule* as creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, *and as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be endorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid.*” The discharge, under that section, clearly operates only to relieve the insolvent from claims of endorsees or holders of bills who are unknown to him at the time of the adjudication. [MAULE, J.—Anybody who saw the description in this schedule, and who was the holder of the bill, would know that it was the security meant.] If the bill had been payable to the order of the drawer, the description might perhaps have sufficed. But here the defendant had notice on the face of the bill that the plaintiffs were his creditors. [MAULE, J.—It may be said that he could not know that

the plaintiffs continued to be the holders.] *Prima facie*, the only creditors upon this bill would be the payees: and the presumption would be that they continued to hold it. In *Reeves v. Lambert*, the insolvent was ignorant of the fact of the endorsement by A. to B. The court there say,—“If it could be shown that the prisoner knew that Mrs. Reynolds (the drawer) was not the real holder of the bill, the case might perhaps be different; but it is here found as a fact, that the defendant had no notice.” [JERVIS, C. J.—An authority is hardly necessary for that: *361] *the case was within the very words of the act.] In *Lewis v. Mason*, 4 C. & P. 322 (E. C. L. R. vol. 19), LITTLEDALE, J., said: “Under the 46th section of the insolvent debtors act, 7 G. 4, c. 57, an insolvent is discharged from all claims of persons not known to him at the time of the adjudication, who may be endorsees or holders of any negotiable security set forth in the schedule. This, therefore, will be a good discharge, if the defendant did not know, at the time of making out his schedule, that the plaintiff was the holder of this bill. If you believe the witness called for the plaintiff, *he knew that the plaintiff was the holder*, and this is no discharge: but, by the evidence of the attorney’s clerk, it appears that he made inquiries, and could get no information as to who was the holder of this bill. It might have been that the defendant forgot all about it; and that would reconcile all the statements. But, if that were so, that is no excuse for the defendant; for if he once know who was the holder, it was his own fault if he forgot it.” And this direction was approved by the court. In *Pugh v. Hookham*, 5 C. & P. 376 (E. C. L. R. vol. 24), it was held by TINDAL, C. J., that, if an insolvent debtor knows, at the time of filing his schedule, that a bill of exchange had been endorsed to a particular person some time before, he is bound to give notice to that person, although he cannot tell whether he continues to be holder at the time of filing the schedule. That ruling is precisely in point. PARKE, B., in the course of the argument of *Boydell v. Champneys*, 2 M. & W. 433,† says: “The effect of the transfer of a bill of exchange is, to transfer the *debt*, and to render the endorsee for the time the creditor.” And Lord ABINGER, in giving judgment, says: “The obvious meaning and intention of the act of parliament was, to discharge the party from all his debts, on his giving in his schedule *the best account he could give* *362] *of them, so that the parties interested might have notice what debts he sought to be discharged from.” Here, the parties interested in this debt, could obtain no information at all from the schedule. *Beck v. Beverley*, 11 M. & W. 845,† is also a conclusive authority against the validity of the discharge in this case. It was there held, that the discharge of an insolvent debtor from a debt in respect of which he has accepted a bill of exchange, is no discharge as to the bill in the hands of a third person, unless the holder’s name be inserted in the schedule, or it be stated therein that he is unknown,

pursuant to the 1 & 2 Vict. c. 110, s. 75. Observing upon *Reeves v. Lambert*, PARKE, B., says,—“That case applies where the bill is inserted in the schedule: here, the defendant pleads that the original debt, not the bill of exchange, was inserted in the schedule. There, the instrument was properly inserted in the schedule, and the statute provides expressly for that case by the 75th section: here, it was not.” And, in giving judgment, the same learned judge said: “The plea is bad in substance, on the ground that a discharge from the original debt is no discharge as to the bill, which is in the hands of a third person. The proper course is, to insert the *holder's* name in the schedule, or to state that he is not known; *otherwise it is no discharge as against the holder.*” [MAULE, J.—It surely cannot be necessary to state in the schedule that the holder is unknown.] By s. 62, a dividend is to be made amongst the creditors mentioned in the schedule; by s. 87, the insolvent is to execute a warrant of attorney to confess judgment for the amount of debts inserted in the schedule; and s. 93 provides for accidental mistakes therein. But, where a mistake is made in the amount of a debt, so as to deprive the creditor of the right to notice under s. 71, though without any fraudulent intention, the case is not *within the protection of the 93d section: *Hoyles v. Blore*, 14 [*363 M. & W. 387;† *Maile v. Bays*, 2 D. & L. 964.

Hawkins, in support of his rule.—The cases last cited have no bearing whatever upon the point now before the court: the want of notice is immaterial, if the *debt* is scheduled. In *Beck v. Beverley*, the defendant had made no mention of the bill in his schedule. The 69th section provides that the schedule shall contain “a full and true description of all debts due or growing due from the prisoner at the time of making the vesting order, and of all and every person and persons to whom such prisoner shall be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively.” [CRESSWELL, J.—Is he not indebted to the payees of the bill?] No doubt he is, if it remains in their hands. [CRESSWELL, J.—When he accepts the bill, he makes an original contract with the payees, appropriating to their use so much money of the drawer in his hands.] Clearly he does. But the last words of the 75th section apply to the insolvent's knowledge at the time of the adjudication: he is *then* for the first time required to swear to the truth of his schedule. [JERVIS, C. J.—Where the insolvent once knows a party to be the holder of his acceptance, he must insert his name in his schedule, or take the chance of his being still the holder.] The presumption is, that a dishonoured bill goes back to the drawer. [CRESSWELL, J.—If the insolvent chooses to speculate upon that presumption, must he not abide the consequences of being wrong?] The simple question is, whether the defendant *knew* the plaintiffs to be the holders of this bill at the time of adjudication. [JERVIS,

*364] C. J.—Was he not bound to give the names of the last *known holders?] If the statute had intended that the last known holder should be mentioned, it would have said so. [JERVIS, C. J.—The object of the statute was to give *fair* notice to creditors. Why should we put such a construction upon its words as to enable the insolvent to evade giving notice to the real creditor, and so avoid his opposition?] The bill is truly described: and, if the plaintiffs had seen this schedule, they could not fail to see that the bill which they held was the bill intended to be described therein.

JERVIS, C. J.—I am of opinion that this rule must be discharged. It is not necessary to determine whether or not the description of this debt in the insolvent's schedule is accurate, or whether, in order to operate a discharge under the concluding part of the 75th section, the insolvent is bound to name all the parties to whose hands he may know the bill to have come, or whether it is enough to state the original creditor: because, even assuming the instrument to have been properly described here, the defendant is not discharged as against the present plaintiffs. By the 75th section, the insolvent is to be discharged "as to the several debts and sums of money due, or claimed to be due, at the time of making the vesting order, from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors, for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order, and which were not then payable, and as to the claims of all other persons, *not known* to such prisoner at the time of such adjudication, who may be endorsees or holders of any negotiable security set forth in such schedule." The question is, upon whom is cast the burthen of proving the want of knowledge. It is said that a dishonoured bill must be presumed to have got back to the hands of the drawer.

*365] *But here it is shown that the defendant knew, at the time he accepted the bill, that the plaintiffs were the holders, for it was made payable to them; and, if the insolvent chooses to speculate upon their having ceased to be the holders, and it turns out that he is mistaken, he is not discharged as to their claim. *Pugh v. Hookham* appears to me to be an express authority upon the subject, and one by which we must be bound.

MAULE, J.—I agree with my lord chief justice in thinking that the discharge of the defendant under the act was inoperative with respect to the claim of these plaintiffs. The spirit of the insolvent act I take to be this,—that, as a condition of his discharge, the insolvent shall name in his schedule all his creditors, and all persons who claim to be his creditors, and shall truly describe all the debts as to which he seeks to be discharged. In the case of negotiable securities, it may be that the insolvent is unable to name the creditors; but it does not, therefore, follow that he is to abstain altogether from describing them. If he *can* describe the holder, there is no reason why

he should not. The 69th section does not say that the insolvent shall describe all his creditors; but that he shall give a full and true description of all his debts, and of the persons to whom he is indebted, or who may to his knowledge or belief claim to be his creditors, together with the nature and amount of such debts and claims. That is, he is to give as full and true a description as he can give. I am disposed to think that the act requires that the schedule shall contain the name of the holder of a negotiable security, where his name is known, or, if he be unknown, some reference to him as holder or endorsee. This latter is not so perfect a description of the creditor as if he were named: but there is no reason why the insolvent should be held responsible for his ignorance of that which is inaccessible to *him. Then, s. 75 [*366 proceeds upon the assumption of creditors who can be named [being named, and that those who cannot are in some other way referred to: if it were not so, the adjudication would be a discharge as against creditors who are not described in the schedule by name or otherwise. I think the way I have suggested would be the proper way of framing a schedule; and, if so, the defendant in this case has not so described this debt as to entitle himself to the relief he seeks. *Pugh v. Hookham*, however, is a direct authority, and was I think properly decided. It is true it is only a nisi prius decision; but the plaintiff had a verdict, and it does not appear to have been questioned.

CRESSWELL, J.—I am entirely of the same opinion. As to the 69th section, I am disposed to concur with my brother MAULE, that the insolvent should insert in his schedule as accurate a description as possible of all negotiable securities upon which he is indebted. But it is not necessary to deal with that question here. Upon the authority of *Pugh v. Hookham*, I think the defendant was bound to describe these plaintiffs as the holders of the bill in question.

TALFOURD, J., concurred.

Rule discharged.

*THE QUEEN *v.* THE SHERIFF OF LEICESTERSHIRE, [*367
In a cause of
ARDEN *v.* GOODACRE. May 28, 1850.

The discretion of the court, on setting aside an attachment against the sheriff for the escape of a prisoner taken on a *ca. sa.*, is to be governed by the principle laid down in an action for damages under the 5 & 6 Vict. c. 98, s. 31; and, if, necessary, an action will be directed, to ascertain the amount of such damages.

IN Easter term, 1850, *Channell*, Serjt., on behalf of the sheriff of Leicestershire, obtained a rule nisi to stay the proceedings against him upon an attachment for a false return to a writ of *ca. sa.*, upon payment of such sum as the court might direct, or for a reference to the master

to ascertain what damages (if any) the plaintiff had sustained by reason of the escape of the debtor from the sheriff's custody. The motion was founded upon the 31st section of the 5 & 6 Vict. c. 98, which enacts, "that, if any debtor in execution shall escape out of legal custody after the passing of this act, the sheriff, bailiff, or other person having the custody of such debtor, *shall be liable only to an action upon the case* for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape;" and by which, it was submitted, the discretion of the court ought to be regulated in dealing with attachments.

It appeared from the affidavits, that William Bingham, the person against whom the *ca. sa.* was issued, was indebted to the plaintiff in the sum of 2690*l.*; that the plaintiff had writs out against him in Somersetshire, Middlesex, and Leicestershire; that Bingham was arrested in Leicestershire, as he returned from his father's funeral; and that he was placed by the officer in a dog-cart, whence he escaped, and went abroad.

It further appeared that Bingham was entitled, under the will of his *368] father, to an annuity of 300*l.* per annum, *for which his receipt alone was to be a discharge to the executors, and without whose consent he was not to be at liberty to charge or assign it. It was conceded that the escape was without any collusion on the sheriff's part.

Byles, Serjt., *Lush*, and *Karslake*, in Trinity term, 1850, showed cause against that rule.—The return being confessedly bad, there is no case when the sheriff has been relieved from the attachment, except upon payment of the debt and costs. [MAULE, J.—Do you find any case where he has been relieved *upon payment* of the debt and costs?] In *Connop v. Challis*, 6 D. & L. 48, which occurred since the statute, the plaintiff recovered the debt and costs. There certainly is no precedent for granting relief to the sheriff on any other terms. That was the penalty under the statute of Westminster 2 (13 Ed. 1, c. 1); *Hepel v. King*, 7 T. R. 370. The *onus* of showing circumstances to cut down the liability rests upon the sheriff. If the escape had not taken place, the plaintiff might have taken an assignment of the debtor's interest in the annuity; for, the condition against assignment was clearly void: Litt. § 360; Co. Litt. 206 b, 223 a; *Jarman on Wills*, Vol. I. p. 811; *Graves v. Dolphin*, 1 Simons, 66; *Snowdon v. Dales*, 6 Simons, 524; *Tollner v. Marriott*, 4 Simons, 19; *Mitford v. Mitford*, 9 Ves. 100.

Channell, Serjt., and *Hugh Hill*, in support of the rule.—Formerly, the sheriff was liable, in an action of debt upon the statute of Edward, to the full extent of the debt and costs in the original action. Now, by the recent statute, that action is taken away, and an action upon

the case substituted, in which the plaintiff is to *recover only to the extent of the damages actually sustained by reason of the escape. The question is, whether the court will, where the party seeks his remedy by attachment, instead of by action, impose upon the sheriff a greater degree of liability than the legislature has thought fit to substitute. The true measure of damages in such a case, is, not necessarily the whole debt, but such a sum as the jury think equivalent to the real loss: *Clifton v. Hooper*, 6 Q. B. 468 (E. C. L. R. vol. 51). In *Connop v. Challis*, there was no dispute as to the party's solvency; and the amount was only 30*l*. This is not like the case of a wilful contempt of the process of the court. It does not appear what is the probable amount of injury the plaintiff has sustained. The annuity is charged upon personal estate in the hands of the executors. No doubt, there are cases where it has been held that a condition which is repugnant to the grant or estate, fails; *Com. Dig. Condition* (D. 4): but this is not a case of that sort: there is no repugnancy in the stipulation that the son shall receive the annuity on condition that he appears at a given place to receive it, and signs an acquittance. The cases cited to show that such an annuity is assignable, are all cases of bankruptcy, where the assignees claimed in consequence of the absence of words giving the property over: *Piercy v. Roberts*, 1 Mylne & K. 4. There are many cases where the court, being unable to do justice between the parties, by reason of the uncertainty of some fact, is in the habit of directing an issue or an action to be brought for the purpose of ascertaining it more conveniently and satisfactorily.

WILDE, C. J.—In determining what penalty the court is to impose for the sheriff's contempt of its authority in not duly executing the writ, it has been usual to look at *the amount of injury which the suitor has sustained, in order that full justice may be done. In exercising our discretion in this respect, we derive some assistance from the statute. For a long time, the ordinary remedy for the escape of a prisoner in execution, was, by an action of debt, in which the plaintiff recovered the full amount of debt and costs. That being found to operate injustice in many cases, the legislature in 1842 laid down a new rule, to which the court must have regard in exercising its discretion in all cases of this sort. The materials, however, which are presented to us in this case are of too uncertain a description to enable us to come to any satisfactory result. It seems to us, therefore, that the proper course will be, to let the attachment stand over, and leave the plaintiff to bring his action against the sheriff,—which will be preferable to an issue, inasmuch as it will give either party an opportunity to tender a bill of exceptions if it should be thought desirable. At the same time, the court think, that, as the plaintiff has undoubtedly sustained some injury, he ought to be allowed the option of a reference to the master if he thinks fit. And we think the sheriff should plead the

general issue to the action, and admit the caption and escape, and that judgment should be entered up as of this term.

The rest of the court concurring,

Rule enlarged accordingly.(a)

(a) See the next case.

*371]

*ARDEN v. GOODACRE. June 9.

The true measure of damages in an action on the case against the sheriff, under the 5 & 6 Vict. c. 98, s. 31, for the escape of a prisoner taken on a *ca. sa.*, is, "the value of the custody of the debtor at the moment of the escape; and no deduction is to be made on account of anything which the plaintiff might have obtained by diligence after the escape:" but, if the plaintiff has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from retaking the debtor, the damages will be materially affected by such conduct.

THE declaration stated, that the plaintiff had recovered a judgment in the Court of Common Pleas against William Bingham, for 4000*l.* debt, and 3*l.* 10*s.* costs, and had sued out a *testatum ca. sa.* upon the said judgment, directed to the sheriff of Leicestershire; that, at the time of the issuing of the writ, the sum of 2690*l.* was due and owing from Bingham to the plaintiff; that the writ was duly endorsed and delivered to the defendant, then being sheriff of Leicestershire, to be executed; that by virtue thereof the defendant took and detained the said William Bingham, until afterwards the defendant, so being such sheriff, against the will of the plaintiff, suffered and permitted the said William Bingham to escape and go at large; that the sum endorsed to be levied still remained due to the plaintiff; and that, by means of the premises, the plaintiff had lost the said debt, and the benefit of the said judgment, &c.

The defendant pleaded, not guilty.

At the trial before JERVIS, C. J., at the sittings in Middlesex, after Hilary term, 1851, it appeared that the capture and escape of the debtor took place, under the circumstances already mentioned, on the 5th of January, 1850; that no attempt had been made, either by the sheriff or by the plaintiff, to retake him; that in July or August following, he was arrested at Maidstone, at the suit of two other creditors; that notice of that fact was immediately sent to the office of the plaintiffs' attorney in London, but, in consequence of his absence from town, and no person authorized to act in the matter being in attendance, nothing was done; and Bingham obtained his liberty by assigning the annuity to the two persons at whose suit he was detained, and went abroad.

*372]

*Henry Bingham, the brother, and one of the executors under the father's will, who was called, stated, that, if his consent was

necessary to the assignment of his brother's interest in the annuity, he would have withheld it.

The lord chief justice, in leaving the case to the jury, told them that the legislature having thought fit to alter the form of remedy, with a view to limiting the plaintiff's recovery to damages commensurate with the injury he had actually sustained by means of the sheriff's neglect, they must take all the circumstances into their consideration; and that, if they thought the plaintiff might, by using ordinary diligence, have arrested Bingham at a time subsequent to the escape when his means of satisfying the debt were better than they were after what took place at Maidstone, they were at liberty to take that as an ingredient in estimating the damages: and he desired them to say what damages they thought the plaintiff entitled to, supposing the annuity not to be legally assignable, and what if William Bingham might have assigned it without his brother's assent.

The jury returned a verdict for the plaintiff,—assessing the damages upon the former supposition at 10*l.*, and upon the latter at 40*l.*

Byles, Serjt., for the plaintiffs, in Easter term last, obtained a rule nisi for a new trial, for misdirection.

Channell, Serjt., and *Hugh Hill*, on a subsequent day in the same term, showed cause.—When the court determined that the measure of damages,—there having been no wilful contempt of its process,—was not to be the full amount of the original debt, it virtually decided the principle upon which the assessment of damages was to take place. The plaintiff's own opinion of the utter worthlessness of his debtor's custody, could be no better *illustrated than by the fact of his [*378 total omission to adopt any means to effect his re-capture. [CRESSWELL, J.—Is the sheriff entitled to claim by way of set-off what might have been saved if due diligence had been used by the creditor?] No doubt the creditor is to have an indemnity. But it cannot be denied that the statute intended to limit the sheriff's liability. In the case of a collision at sea, the assured is bound to use all reasonable means to lessen the amount of the loss, before he resorts to the underwriters. According to the authority of *Clifton v. Hooper*, 6 Q. B. 468 (E. C. L. R. vol. 51), the plaintiff might be entitled to nominal damages: but, to entitle him to recover substantial damages, he must show that he has sustained a substantial loss. A servant hired for a year, and dismissed during that period, without notice, is not entitled to wages for the whole period, but only to damages commensurate with the loss sustained by the dismissal.(a)

Lusk and *Karslake*, in support of the rule.—The sheriff is excused for an escape only by the act of God or the King's enemies. His liability in this respect has been compared to that of a common carrier: *Alsept v. Eyles*, 2 H. Blac. 108. In return the law gives him remedies larger than those of any other person. He may follow the party with-

(a) See *Edmonds v. Challis*, 7 C. B. 413, 440 (E. C. L. R. vol. 62.)

out writ, even out of his own jurisdiction; he may indict him for the misdemeanor; or he may have an action upon the case against him, and recover damages for the wrongful escape: Dalton's Sheriff, 113, 139, 486, 487. At common law, he might plead the recaption in bar to an action by the creditor for the escape: Bac. Abr. *Escape* (H); Dalton's Sheriff, 486; Chambers v. Jones, 11 East, 406. [WILLIAMS, J.—The whole law is discussed in *Rigeway's case, 3 Co. Rep. *374] 52, a.] In no case, or book, is it said to be the duty of the execution-creditor to take any step to remedy the sheriff's default. He has done all that is incumbent on him, when he delivers the writ to the sheriff. If it were his duty to make attempts to retake the party, he would of course be entitled to the costs thereby incurred: but there is no precedent for his recovering such costs. The real question is, what is the value of the custody to the execution-creditor at the moment of the escape. Even in an action for an escape on *mesne* process, the whole debt is sometimes recovered against the sheriff: per ABBOTT, C. J., in Hunter v. King, 4 B. & Ald. 209 (E. C. L. R. vol. 6). [WILLIAMS, J.—In The Sheriffs of Norwich v. Bradshaw, Cro. Eliz. 53, the action was against the party himself, and it was held that the sheriff might sue even before he himself had been sued or paid the money.] Clifton v. Hooper, 6 Q. B. 468 (E. C. L. R. vol. 51), is strongly in the plaintiff's favour: it was there held that the action lies, even though no actual pecuniary damage has arisen from the sheriff's default. [JERVIS, C. J.—You contend, that, if, on the day notice was given to the plaintiff's attorney that his debtor was in custody at Maidstone, he might by issuing his writ have then obtained his debt, but voluntarily abstained from doing so, the sheriff is liable for the whole debt, if the debtor afterwards became worth nothing?] Unquestionably. It is not the creditor's duty to take any step: it is the duty of the sheriff to cure his own default. [JERVIS, C. J.—He can only go out of his county on fresh pursuit.] He might get an escape warrant. Besides, this action was commenced on the 28th of May, 1850, which was long before Bingham's capture in Kent. *Cur. adv. vult.*

*375] *JERVIS, C. J., now delivered the judgment of the court.

In summing up this case to the jury, I told them, in substance, that they might take into consideration the conduct of the plaintiff, and might reduce the damages, if they thought he had been guilty of laches, and might by some activity have arrested his debtor at a period when he had the means of paying his debt. My brother *Byles* complained of this as a misdirection; and, after argument, I concur with the rest of the court in thinking that it ~~was~~ a misdirection,—that I was wrong,—and that, therefore, the rule for a new trial must be made absolute.

The only action which now lies against a sheriff for an escape on final process, is, an action on the case for such damage as the plaintiff

may have sustained by reason of such escape,—5 & 6 Vict. c. 98, s. 31: but, although the recent statute has merely compelled the party to resort to the common law form of remedy, and although this form of remedy always existed together with the action of debt against the sheriff for the recovery of the whole debt,—we cannot find, that in any case, the principle upon which such damages are to be assessed has been clearly defined.

Upon consideration, we are of opinion that the true measure of damages, is, the value of the custody of the debtor at the moment of the escape; and that no deduction ought to be made on account of anything which the plaintiff might have obtained by diligence after the escape.

At first sight, this principle may appear to conflict with the rule which permits a re-capture, upon fresh pursuit, before action brought, to be pleaded in bar to an action for an escape on final process: because the circumstances of a debtor may greatly alter between his escape and his re-capture. But the reason why a re-capture is so pleadable, removes this apparent conflict. The debtor *is* supposed never to have been out of custody; and the alteration in his circumstances is therefore immaterial. [*376]

This rule will not operate unjustly towards the sheriff; for, the damage will be assessed according to the circumstances of each particular case. If the execution-debtor had *not* the means of satisfying the judgment at the moment of the escape, the plaintiff will have lost only the security of the debtor's body; and the damages may be small. If the execution-debtor *had* the means of satisfying the judgment at the moment of the escape, and has wasted those means since the escape, it is plain that the plaintiff has lost the chance of obtaining satisfaction of his judgment, through the sheriff's neglect; and the jury would be justified in giving the full amount of the execution.

It may be said that the plaintiff might, by diligence, have arrested the debtor before he had the opportunity of wasting his means: but so might the sheriff: he may re-take a debtor, upon fresh pursuit, in any county,—*Rigeway's case*, 3 Co. Rep. 52,—without an escape warrant,—*Anderson v. Hampton*, 1 B. & Ald. 309: and the fact of the writ being now returnable *immediate* will not prevent him from so doing; for, the debtor who has wrongfully escaped, cannot insist that he is not still in custody.

There is, however, a third case in which the rule might be supposed to operate unjustly towards the sheriff,—where the execution-debtor has the means of paying the debt at the moment of the escape, and still continues notoriously in solvent circumstances. In this case, the value of the custody was, the amount of the debt, and the plaintiff will be entitled to recover substantial damages. It is true, that the recovery of such damages will not satisfy the execution; and the debtor

may be re-taken by the plaintiff; for, the debtor cannot take advantage of *his own wrong, and avail himself of the recovery against the *377] sheriff. On the other hand, the sheriff is not damnified: for, he may re-take the debtor, or recover against him by action the amount which he has been compelled to pay.

If the laches of the plaintiff could be used to mitigate the damages against the sheriff, the plaintiff would be compelled, in every case, to issue a fresh writ, and incur expense, to relieve himself, to some extent, from the consequences of the sheriff's negligence: but, if such were the plaintiff's duty, we should find some trace of the sheriff's liability to re-pay such expenses, where the debtor was not re-captured upon the second writ; and the plaintiff's exertions were unavailing to realize the amount of his judgment.

If the sheriff return *nulla bona* to a writ of *fi. fa.*, and the plaintiff know of goods belonging to his debtor, he need not issue forth a second writ of *fi. fa.*, but may, in an action for a false return, recover from the sheriff the value of the goods which the sheriff ought to have taken. So, if a debtor who escapes has goods, the plaintiff is not bound to avail himself of the privilege conferred by the statute (8 & 9 W. 3, c. 27), and issue a writ of *fi. fa.* He may bring his action against the sheriff for the escape: and the jury ought not, in estimating the damages, to take into consideration that the plaintiff might by writ of *fi. fa.* have realized a portion of his debt.

We must not, however, be understood to decide that the plaintiff's conduct can, under no circumstances, have a material bearing upon the damages. If he has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from re-taking the debtor, the damages would be materially affected by such conduct. We merely decide, that, in estimating the value of the custody of the debtor at the moment of the escape, there ought to be no deduction on *378] account of anything *which the plaintiff might have obtained by diligence after the escape. The rule must be absolute for a new trial.

Rule absolute accordingly.

In an action on the case for an escape, the measure of damages is the actual loss which the plaintiff has sustained. Hence, it is competent for the defendant to prove the insolvency of the defendant in the execution: *Shuler v. Garrison*, 5 Watts & Serg. 455; *Patterson v. Westervelt*, 17 Wend. 543; *Smith v. Hart*, 1 Dravard, 146; *Spafford v. Goodell*, 3 M'Lean, 97.

ABLEY v. DALE. *June 13.*

One who has obtained his discharge under the insolvent debtors act is still liable, at the discretion of the judge of a county court, to be committed, under the 99th section of the 9 & 10 Vict. c. 95, for disobedience of an order made upon a judgment summons under s. 98, obtained after such discharge.

But, *semble*, that the discretion is one which ought to be exercised with extreme caution, and only under very special circumstances.

THIS was an action of trespass for an alleged false imprisonment of the plaintiff under a warrant issued out of the Whitechapel County Court of Middlesex.

The cause was tried before JERVIS, C. J., at the sittings at Westminster after Hilary term, 1851. It appeared, that, in June, 1847, a plaint was levied by the now defendant and one G. C. Dale (his son) against the now defendant, in the Whitechapel County Court, for a debt of 13*l.* 3*s.*; that, at the hearing, on the 10th of June, the now defendant and G. C. Dale obtained a verdict for 13*l.* 8*s.* debt, and 2*l.* 7*s.* costs, which the judge ordered to be paid by instalments of 15*s.* per month; that the now plaintiff having paid on account of those instalments various sums amounting in the whole to 2*l.* 7*s.* 4*d.*, and the balance of 12*l.* 12*s.* 8*d.* remaining unpaid, the now defendant and G. C. Dale, on the 20th of May, 1849,—which was after the debtor (the now plaintiff) had obtained his discharge from this amongst other debts under the insolvent debtors act,—obtained a judgment-summons against the now plaintiff, under the 98th section of the county court act, 9 & 10 Vict. c. 95; that the now plaintiff appeared to the summons on the 31st of May, when the judge of the county court made an order that the now plaintiff should pay the debt, together with the further sum of 1*l.* 13*s.* 8*d.* for costs, by monthly *instalments of 10*s.*, or be committed [*379 to the house of correction for twenty days; and that, two monthly instalments being unpaid, a warrant of commitment issued on the 17th of August against the now plaintiff out of the county court, under which he was arrested on the 20th, and carried to the house of correction.

There was no evidence to show that the now defendant had in any way interfered to cause the warrant for the plaintiff's commitment to be issued or put in execution: but it was proved, that, when the defendant was before the insolvent debtors court for the purpose of opposing the plaintiff's discharge, he said, that, if it cost him 100*l.*, he would obtain an order from the county court, and lock him up: and the clerk of the county court, who was called as a witness on the part of the plaintiff, stated, that, by the rules of practice of the county court, no warrant of commitment could be issued without the production of the plaint-note, and payment of the fees.

On the part of the defendant, it was submitted that there was no

evidence to go to the jury to show that *he* had procured the warrant to be issued, or that he was in any way instrumental in causing the plaintiff to be taken under it.

The lord chief justice, however (reserving leave to move), left the question to the jury, and they returned a verdict for the plaintiff, damages 40s.

Macaulay, in Easter Term last, obtained a rule nisi to enter a nonsuit.

Lush showed cause.—Connecting the expressions which were proved to have been used by the defendant when before the insolvent debtors court, with what was afterwards done in the county court, no reasonable man could come to any other conclusion than that to which the *380] jury came. If the son were the actor, and not the *father, the son might have been called to prove it. The defendant was the party who applied for and obtained from the county court judge the order upon which the warrant was founded,—an order which was palpably void, upon the face of it, and which even the judge who issued it knew to be bad. The evidence showed that no warrant could have issued without the production of the plaint-note, and payment of the fees; and it was only the defendant who could have produced it.

Hugh Hill, in support of the rule.—It was not to be expected that the son would come into court for the purpose of proving himself a trespasser. It was for the plaintiff to make out a case which called for an answer: and this, it is submitted, he failed to do. The fact of the defendant's saying in the insolvent debtors court, that he would get an order from the county court to lock up the plaintiff, is no evidence to show that he intended to do an illegal act. [JERVIS, C. J.—Suppose the plaintiff had proved that the defendant himself had brought the plaint-note to the office, you would have said the same.] No doubt: the mere lodging a plaint-note is no evidence of a direction or request to anybody to do an illegal act: by so doing, he would only ask to have the law put in motion in a proper and justifiable manner. Besides, it by no means follows that the lodging the plaint-note necessarily amounts to a direction to issue a warrant: the clerk of the county court did not say that it did. In a recent case in this court, there was a strong intimation of opinion, that, where there are two clear and undisputed debts, the case is not taken out of the statute of limitations as to either debt, by evidence of a part payment within six years, not specifically appropriated to the one debt or the other. [WILLIAMS, J.—That was the case of *Burn v. Boulton*, 2 C. B. 476 (E. C. L. R. vol. 52). The *381] authority, if it be one, would have *been more applicable, if both the Dales had been quiescent. CRESSWELL, J.—Similar evidence of the assertion of an intention to burn a stack or a barn would be evidence for the jury upon a trial for the felony: and why not here? That would be a declaration of an intention to do an act which the

party must know to be illegal. [CRESSWELL, J.—How can this knowledge of the illegality affect the question of whether he did the act or not?] At the time the defendant made the declaration alluded to, it must be assumed that he intended to proceed according to law. [JERVIS, C. J.—Suppose the defendant had handed the warrant to the officer?] Then it could not have been contended that he would not be liable. [JERVIS, C. J.—Was not the lodging the plaint-note substantially the same thing?] It does not follow that a warrant is to issue, because a plaint-note is lodged: the evidence did not establish that. [WILLIAMS, J.—The complaint is, that the defendant has put a pen in motion which could not possibly make a legal order.] The defendant did not act to authorize the issuing of an illegal order,—an order which the judge had no jurisdiction to make. [JERVIS, C. J.—This point was not made at the trial. Assuming that the defendant lodged the plaint-note with the clerk of the county court, is he liable because the judge illegally ordered a warrant to issue? and had the judge jurisdiction? I think, as these points were not made at the trial, or on moving, that Mr. *Lush* ought to have an opportunity of being heard upon them.]

Lush.—It may be conceded, that, if the irregularity here was entirely the act of the county court, or of the clerk of the court, without any participation on the defendant's part, the defendant would not be liable in *trespass*, provided the court had jurisdiction. But it is submitted that the county court had no jurisdiction in this case; for, that a party discharged under the insolvent *debtors act, is not liable to be [*382 called before the county court upon a judgment-summons. There is no distinct decision upon the subject; but intimations to that effect have been thrown out in *Ex parte Pardy*, 1 L. M. & P. 16, and in *Still v. Booth*, 1 L. M. & P. 440. [JERVIS, C. J.—Assume that to be so: the evidence here is, that the defendant asks for a judgment-summons, that the matter is argued, and the judge makes an order: you must show that the judge had no jurisdiction.] The clause upon which the county court judges have relied as giving them jurisdiction, is the 102d section of the 9 & 10 Vict. c. 95.(a) That section, however, does not authorize proceedings to commit *after* adjudication by the insolvent debtors court: it only applies to orders of discharge pronounced pending the imprisonment of the party under the order of the county court.

(a) Which enacts, "that, whenever any order of commitment shall have been made as aforesaid, the clerk of the said court shall issue, under the seal of the court, a warrant of commitment directed to one of the bailiffs of any county court, who by such warrant shall be empowered to take the body of the person against whom such order shall be made; and all constables and other peace officers within their several jurisdictions shall aid in the execution of every such warrant; and the gaoler or keeper of every gaol, house of correction, and prison mentioned in any such order, shall be bound to receive and keep the defendant therein until discharged under the provisions of this act, or otherwise by due course of law: and no protection, order, or certificate granted by any court of bankruptcy, or for the relief of insolvent debtors, shall be available to discharge any defendant from any commitment under such last-mentioned order."

By the 69th section of the 1 & 2 Vict. c. 110, the insolvent is required within fourteen days after the making of the vesting order, to file a schedule containing a full and true description of all debts due, or growing due from him at the time of making such order, and of all *383] and every person and persons to whom he shall *be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively. By s. 75, the commissioners are empowered "to adjudge that such prisoner shall be discharged from custody and entitled to the benefit of this act, at such time as the court or commissioner, &c., shall direct, in pursuance of the provisions hereinafter contained in that behalf, as to the several debts and sums of money due or claimed to be due, at the time of making such vesting order as aforesaid, from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be endorsees or holders of any negotiable security set forth in such schedule." The 76th section enacts, "that, in all cases where no cause shall appear to the contrary, it shall be lawful for the court or commissioner, &c., according as shall seem fit, to adjudge that such prisoner shall be so discharged, and so entitled, forthwith, or so soon as such prisoner shall have been in custody at the suit of one or more of the persons as to whose debts and claims such discharge is so adjudicated, for such period or periods, not exceeding six months in the whole, as the said court, &c., shall direct." In cases of concealment or falsification of books, &c., the court is, by s. 77, empowered to imprison the party for any period not exceeding three years: and by s. 78, if it shall appear to the court that the insolvent has contracted debts fraudulently, or by means of breach of trust or false pretences, or without having reasonable or probable expectation at the time when contracted of paying the same, or shall have fraudulently or by means *384] of false *pretences obtained the forbearance of any of his debts by any of his creditors, or shall have put any of his creditors to any unnecessary expense by any vexatious or frivolous defence or delay to any suit for recovering any debt or sum of money due from such prisoner, or shall be indebted for damages recovered in any action of crim. con., seduction, breach of promise of marriage, malicious prosecution, libel, slander, &c.,—the court may adjudge him to be entitled to his discharge as to such debts or damages, when he shall have been in custody for a period not exceeding two years. Section 79 enacts that such discharge shall extend "to all process issuing from any court, *for any contempt of any court, ecclesiastical or civil, for non-payment of money or of costs or expenses in any court ecclesiastical or civil;*

and that, in such case, the said discharge shall be deemed to extend also to all costs which such prisoner would be liable to pay in consequence or by reason of such contempt, or on purging the same." The 90th section gives an immunity as large and extensive as words can make it: it enacts "that no person who shall have become entitled to the benefit of this act, by any such adjudication as aforesaid, shall at any time thereafter be imprisoned by reason of the judgment so as aforesaid (s. 87) entered up against him or her, according to this act, or for or by reason of any debt or sum of money, or costs, with respect to which such person shall have become so entitled, *or for or by reason of any judgment, decree, or order, for payment of the same*; but that, upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or for or by reason of any such debt or sum of money, or costs, or judgment, decree, or order for payment of the same, it shall be lawful for any judge of the court from which any process shall have issued in respect thereof, and such judge is hereby required, upon proof made to his satisfaction that the cause of such arrest or *detainer is such as hereinbefore mentioned, to release [*385 such prisoner from custody, unless it shall appear to such judge, upon inquiry, that such adjudication as aforesaid was made without due notice, where notice is by this act required, being given to or acknowledged by the plaintiff on such process, or being by him dispensed with by the acceptance of a dividend under this act, or otherwise." [WILLIAMS, J.—In *Ewart v. Jones*, 14 M. & W. 774,† it was held that an action of trespass cannot be maintained against a creditor who, without malice, sues out a writ of *ca. sa.* upon a judgment regularly obtained by him against his debtor after the debtor's discharge under the Irish insolvent debtors act, 3 & 4 Vict. c. 107; the 81st and 82d sections of that act do not render the writ absolutely illegal and void *ab initio*, but only give the debtor a remedy, by application to the court or a judge for his discharge out of custody.] Precisely the same inquiry is gone into in the insolvent debtors court under the 1 & 2 Vict. c. 110, s. 78, as is gone into in the county court, under the 9 & 10 Vict. c. 95, ss. 98, 99,(a) upon a *judgment-summons. And it surely never [*386 could have been intended, that, after a party has undergone the

(a) The 98th section enacts "that it shall be lawful for any party who has obtained any *executed judgment or order* in any court held by virtue of this act, or under any act repealed by this act, for the payment of any debt or damages or costs, to obtain a summons from any county court within the limits of which any other party shall then dwell or carry on his business, such summons to be in such form as shall be directed by the rules made for regulating the practice of the county courts as herein provided, and to be served personally upon the person to whom it is directed, requiring him to appear at such time as shall be directed by the said rules, to answer such things as are named in such summons; and, if he shall appear in pursuance of such summons, he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which is the subject of the action in which judgment has been obtained against him, and as to the means and expectation he then had, and as to the property and means he still hath, of dis-

examination provided by the former act, he should be again submitted to the same ordeal under the latter. To give the county court jurisdiction to issue a judgment-summons, there must be a subsisting judgment upon which the defendant is liable. The county court judge cannot assume to himself jurisdiction by finding facts to give it: *Thompson v. Ingham*, 19 Law Journ., N. S., Q. B. 189. [WILLIAMS, J.—One cannot see very clearly why the discharge from the insolvent *387] debtors *court should prevent the county court judge from punishing the party for his contempt.] The 79th section of the 1 & 2 Vict. c. 110 extends the discharge to process of contempt. [WILLIAMS, J.—For non-payment of money. JERVIS, C. J.—The difficulty is, as to the meaning of the words “any unsatisfied judgment or order,” in the 9 & 10 Vict. c. 95, s. 98.] “Unsatisfied” cannot mean “unpaid;” but unsatisfied by execution,—one from which the party is not by law exonerated.

Hugh Hill, contra.—The true meaning of the words “any unsatisfied judgment,” in the 98th section of the 9 & 10 Vict. c. 95, is, a debt secured by a judgment which has not been satisfied or extinguished. The discharge under the insolvent debtors act clearly does not extinguish a debt so secured. The object of the section is not to procure satisfaction of the debt, but to punish fraud. The statute is penal in this respect: see the judgment of WILDE, C. J., in *Ex parte Kinning*, 5 C. B. 507, 522 (E. C. L. R. vol. 57). That a discharge under the insolvent debtors act is not an extinguishment of the debt, is manifest from the circumstance (amongst others) of its being required to be pleaded: *Bircham v. Creighton*, 10 Bingh. 11 (E. C. L. R. vol. 25), 3 M. & Scott, 345 (E. C. L. R. vol. 30), *Phillips v. Shervill*, 6 Q. B. 944 (E. C. L. R. vol. 51), *Ford v. Dornford*, 8 Q. B. 583 (E. C. L. R. vol.

charging the said debt or damages or liability, and as to the disposal he may have made of any property,” &c.

And the 99th section enacts, “that, if the party so summoned shall not attend as required by such summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to be sworn or to disclose any of the things aforesaid, or if he shall not make answer touching the same to the satisfaction of such judge, or if it shall appear to such judge, either by the examination of the party, or by any other evidence, that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust, or has wilfully contracted such debt or liability without having had at the same time a reasonable expectation of being able to pay or discharge the same, or shall have made or caused to be made any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same, with intent to defraud his creditors, or any of them, or if it shall appear to the satisfaction of the judge of the said court that the party so summoned has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt or damages or costs so recovered against him, either altogether, or by any instalment or instalments which the court in which the judgment was obtained shall have ordered, and if he shall refuse or neglect to pay the same as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter provided, it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed to the common gaol or house of correction of the county, district, or place in which the party summoned is resident, or to any prison which shall be provided as the prison of the court, for any period not exceeding forty days.”

55), *Francis v. Dodsworth*, 4 C. B. 202 (E. C. L. R. vol. 56), are also authorities to show that a discharge under the insolvent debtors act does not extinguish the debt. There is no satisfaction of the judgment, so long as the debt remains unpaid. [CRESSWELL, J.—The general scope of the insolvent debtors act, is, that, although, under certain limitations, the party may be punished for fraud, yet the discharge makes him a new man. The jurisdiction assumed here is certainly opposed to the spirit of the *insolvent law.] It may have been [*388 thought right by the legislature that such power should under certain circumstances be exercised by the county court judges. The 103d section of the 9 & 10 Vict. c. 95, expressly provides “that no imprisonment under this act shall in any wise operate as satisfaction or extinguishment of the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being anew summoned, and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this act, or deprive the plaintiff of any right to take out execution against the goods and chattels of the defendant, in the same manner as if such imprisonment had not taken place.” And the 102d section,—which applies to an order made upon a judgment-summons, and which provides that “no protection, order, or certificate granted by any court of bankruptcy, or for the relief of insolvent debtors, shall be available to discharge any defendant from any commitment under such last-mentioned order,”—puts a commitment under these orders upon a totally different footing from commitments for any other contempts in non-payment of money.

JERVIS, C. J.—The point last argued is one of very great importance. We must, therefore, take some little time for deliberation.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court:

Upon the trial of this cause before me, one point, and one point only, was made for the defendant. It was contended that there was no evidence to show that he had, directly or indirectly, interfered in obtaining or enforcing the warrant. The jury found a verdict for the plaintiff; and I gave the defendant leave to enter a *nonsuit, if the court [*389 should think there was no evidence to be left to the jury upon this point.

Upon considering the evidence, it appeared to the court that the verdict ought not to be disturbed upon the point made at the trial: but, during the argument, Mr. *Hugh Hill* suggested, for the first time, that, consistently with the evidence, the defendant might have merely left the plaint-note with the clerk, with directions to take the necessary steps; and that all the irregularity might have been the act of the court, or of the clerk, without the defendant's knowledge or participation. Mr. *Lush* admitted, that, under such circumstances, the defendant would not be liable in trespass, if the court had jurisdiction: but he

urged that this point, at most, could only entitle the defendant to a new trial; because, if made at the trial, it might have been answered by further evidence. He further contended that the county court judge had no jurisdiction to commit, after the discharge by the insolvent court; and so the defendant would be liable in trespass, and the verdict must stand.

The point thus raised is of great importance, and is attended with much difficulty. It depends upon the true meaning of the word "unsatisfied" in the stat. 9 & 10 Vict. c. 95, s. 98. Although the point has been raised, it has not been expressly decided, after argument *in banc*. In *Ex parte Pardy*, 1 L. M. & P. 16, the discharge by the insolvent court was *after* the order for commitment by the county court: and my brother ERLE, refusing an application for a writ of *habeas corpus*, upon various grounds, "inclined to think, that, taking the facts as stated, the discharge by the insolvent court freed the defendant from all liability in respect of the debts recovered by the judgment of the county court." In *Still v. Booth*, 1 L. M. & P. 440, the order for *390] payment and commitment was *made by the county court after the defendant had been discharged by the insolvent court; and upon this ground my brother COLERIDGE, at chambers, discharged the defendant: whereas, in the same case, an application having been made to set aside a writ of prohibition issued from the petty-bag office, my brother WIGHTMAN observed that he did not see that there was in point of fact any defect of jurisdiction at all, but at most an erroneous exercise of his powers by the county court judge, which would perhaps entitle the defendant to be discharged from the imprisonment.

In this state of the law, unaided by authority, we must endeavour to put a construction upon the word "unsatisfied," in connexion with the words "judgment or order," as used in the 98th section of the act.

It was contended, for the plaintiff, that it was, under the circumstances, absurd to give the insolvent court and the county court a concurrent jurisdiction; that it was unjust to allow the county court judge to commit for the non-payment of a particular debt, a debtor whose whole case had been considered by a competent tribunal, and who had been discharged; and that, adopting, to the full extent, the rule so frequently referred to as the golden rule by which judges are to be guided in the construction of acts of parliament, we ought "to look at the precise words of the statute, and construe them in their ordinary sense only, if such construction would not lead to any absurdity or manifest injustice; but, if it would, then we ought so to vary and modify the words used, as to avoid that which it certainly could not have been the intention of the legislature should be done."

It certainly does seem to be manifestly unjust to commit for the non-payment of a particular creditor, a man whose whole property is trans-

ferred, by order of a competent court, to an assignee for the equal benefit of all his creditors. And many may think it absurd that a *co-ordinate authority should be given to the insolvent commis- sioners and the judge of the county court; and that the latter [*391 should have power to commit for an act which the commissioner, with the same jurisdiction, may have punished by his remand, or adjudged to be venial, by an immediate and absolute discharge,—an absurdity which is in no respect diminished by the recent transfer of the jurisdiction of the insolvent commissioners, in certain cases, to the judges of the county courts. But we cannot adopt this rule, to the full extent to which it is pressed.

If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning.

The discharge of an insolvent debtor does not, in any view of the case, of necessity satisfy the judgment or order, and take away the jurisdiction of the county court in every instance. *Ex concessis*, where a judgment, if it had been in a superior court, might have been enforced against the person of an insolvent, the judge of a county court has jurisdiction, under the 98th section of the statute 9 & 10 Vict. c. 95. Instances are mentioned in the 90th section of the insolvent act, 1 & 2 Vict. c. 110, in which judgments in the superior courts may be so enforced. And, as each judgment or order of the county court may come within this class, the judge of the county court has jurisdiction to issue his summons to inquire into this matter; and, having jurisdiction, if he make an erroneous order upon that summons, and *commit the defendant, the plaintiff will not be responsible in trespass for [*392 the mistake of the judge.

But, independently of this view of the case, the judgment or order is not satisfied by the discharge of the insolvent. The person of the debtor is protected, and the judgment or order cannot be enforced by law upon the debtor's goods; but the debt remains, and may ultimately be satisfied, through the medium of the insolvent court, from the present or subsequently acquired property of the debtor.

To commit a debtor, under such circumstances, for non-payment of a particular creditor, and thus obtain indirectly, by imprisonment, what cannot be had by direct means, is, except under very special circumstances, manifestly unjust; but cases may occur, though rarely, in which the exercise of such a power would be justified; and it is not impossible that the legislature may have supposed that a discretion

formed, they might have been prepared with evidence to rebut the claim, or they might have protected themselves by paying money into court. [MAULE, J.—The plaintiff does in effect tell the defendants so: he says he claims salary.] There is a demand in the declaration *396] to which the particulars are precisely *applicable: and in that respect the case is stronger than *Law v. Thompson*.

JERVIS, C. J.—I am of opinion that there ought to be no rule in this case. If the correct test in these cases were, to look at the particulars and consider whether they are calculated to mislead a person who knows nothing whatever about the matter, it might be true that a particular framed like this would be open to objection. But that is not the test: it is, whether they are so framed as to be calculated, and likely, to mislead a person who has some knowledge of the matter referred to. Unless, therefore, it is shown that the defendants have been misled, or that the case set up is so totally at variance with that stated in the particulars, that there is reasonable ground for supposing that they might have been misled, I see no ground for the rule. The plaintiff states in general terms that he seeks to recover one year's salary. It does not seem to me that that was at all calculated to mislead the defendants. These particulars are not to be scanned with the same strictness of criticism as if we were dealing with a special demurrer.

MAULE, J.—I am of the same opinion. These particulars were clearly not of a nature to mislead the defendant. The plaintiff complains in one count that he has been improperly dismissed by the defendants, and in another that the defendants are indebted to him for work and labour. In asking for particulars, the defendants ask to be furnished with a precise and untechnical statement of what it is that the plaintiff claims. The plaintiff says,—“I desire to be paid one year's salary, from the 1st of June, 1850, to the 1st of June, 1851, at the rate of 200*l.* per annum, or damages for my dismissal before the end of such year.” He puts his *397] claim in the *alternative,—a year's salary (which of course comprehends payment for a portion of that time), or damages for dismissal. “Salary” may comprehend, it is true, money due for work which has not been done; but it also comprehends money due for work which has actually been done. If these particulars did not in fact convey sufficient information to the defendants as to the claim they had to meet, they might have called upon the plaintiff for further and better particulars: and, if the judge had thought right, he would then have directed the plaintiff to state his claim with more particularity, showing whether he intended to rely on any express contract for salary at 200*l.* per annum, or for the value of services actually rendered, or for both. Such amended particulars would not, I think, have been contradictory, but merely explanatory of those already delivered. It is not suggested that the defendants have been misled: and it seems to me that these particulars are free from all objection; for, they state that which pre-

perly lets in all the evidence which was given. In order to sustain my Brother *Byles's* argument, it must be contended that a claim for work done cannot be included in a claim for salary at a given rate per annum.

CRESSWELL, J.—I incline to think that the particulars of demand delivered in this case, though not very clearly expressed, are yet sufficient to justify the evidence which was admitted. The plaintiff claims for one year's salary, at the rate of 200*l.* per annum; or, if not entitled to salary for the whole year, so much as he should be found entitled to, at that rate per annum. I think that clearly entitled him to go into evidence of a *quantum meruit* upon the count for work and labour.

TALFOURD, J., concurred.

Rule refused.

A bill of particulars need not be as special as a count on a special contract; it is sufficiently definite if it apprise the other side of the evidence that is to be offered, so that he cannot mistake as to his preparation to resist the claim: *Smith v. Hicks*, 5 Wend. 51; *Chesapeake Canal Co. v. Knapp*, 9 Peters, 541; *M'Nair v. Gilbert*, 3 Wendell, 346; *Brown v. Williams*, 4 Wendell, 360; *Bonney v. Seely*, 2 Ibid. 481; *Norris v. Badger*, 6 Cowen, 449; *Edwards v. Ford*, 2 Bailey, 461. If a bill of particulars is not calculated to mislead, it will be deemed sufficient: *Tilloy v. Hutchinson*, 3 Green, 178. On the trial a party cannot object to the generality of a bill of particulars, if it includes the cause of action or matter of defence; further particulars should be applied for: *Barnes v. Henshaw*, 21 Wendell, 426. A variance of a year as to the time of a sale, between the bill of particulars and the evidence on the trial, is not material: *Duncan v. Ray*, 19 Wendell, 503.

A clause in a bill stating that the defendant had received "divers other sums of money of divers persons" is too general: *Whittle v. Vaneh*, 2 Pennington, 636. So a bill stating that the action is for bank notes, specifying the denomination of part of them and describing the rest as "bank bills current in the commonwealth amounting to \$500," and for "two checks on Boston banks amounting to \$250," is wholly insufficient: *Babcock v. Thompson*, 3 Pickering, 449. Entries of *Cash*, not specifying whether lent to, paid out for, &c., will not

satisfy an order for a bill: *Stanley v. Millard*, 4 Hill, 50. "That defendant was, before a particular day mentioned, indebted to the plaintiff in \$8000 for money before that time loaned" is not sufficient: *Socia v. Planters' Bank*, 3 Howard, Miss. 46. Under a general charge of cash to a certain amount the defendant will not be allowed to prove that, in the capacity of executor, he had overpaid the plaintiff a legacy left him by the defendant's testator: *Harding v. Griffin*, 7 Blackford, 462. So a bill in the words "balance due on settlement"—"money received at New Orleans on account of the plaintiff" without specifying the date: *Wetmore v. Jennys*, 1 Barbour, 53. So "to bill for cutting and hauling logs on Brassua in the winter of 1841 and 1842:" *Parker v. Emery*, 28 Maine, 492.

The plaintiff's agent gave verbal directions to the defendant to purchase stock, and gave his own note endorsed by his principal to the defendant, and subsequently deposited a bond of a third person to his principal. The bond was paid to defendant. The principal, alleging that defendant never had bought the stock, brought an action for money had and received: it was held that a bill of particulars, stating the claim to be for the balance collected on the bond, was insufficient, for the bill should disclose the gist of the action, which in this case was the failure of the consideration of the note: *Gilpin v. Howell*, 5 Barr, 41.

*398] *MARSHALL v. The YORK, NEWCASTLE, and BERWICK
RAILWAY COMPANY. June 16.

Upon discharging a rule nisi for an attachment against a witness for disobedience to a *subpœna*, a copy of which had been tendered to him enclosed in an envelope, the court refused to allow the costs of showing cause, though the witness swore that the original writ of *subpœna* was not shown, or the nature of the document explained, to him at the time of the alleged service,—there appearing to have been some “approximation” to the offence imputed to the witness.

DENMAN, on a former day in this term, obtained a rule nisi for an attachment against Adolphus Frederick Charles William Stewart Vane, Esq., commonly called Lord Adolphus Vane, for disobedience to a *subpœna* served upon him in the above cause.

The affidavit upon which the motion was founded, stated, that the deponent, Joseph Oakes, did, on the 8th of May, instant, personally serve Lord Adolphus Vane, in Park Lane, with the *subpœna ad testificandum* thereunto annexed, by delivering to and leaving with him a true copy of such *subpœna*, and at the same time showing him the said original *subpœna* thereunto annexed, and tendering to him the sum of 1s. : that the deponent “effected the service of the aforesaid *subpœna* upon the said Lord Adolphus Vane on Thursday, the 8th of May, instant, just before 7 o'clock in the evening of that day, in the manner following, viz., that, as his lordship drove up to the door of his father's house in Park Lane, in his cabriolet, on his getting out, he, this deponent, said to him, ‘You are Lord Adolphus Vane,’ to which he replied, ‘I am; what of that?’ This deponent said, ‘I have got a *subpœna* for you to attend at Westminster Hall in a cause of Marshall against the railway company, for the loss of his portmanteau;’ on which his lordship said, ‘You may be damned; I shall not attend;’ that he, this deponent, replied, ‘Here is the copy,’ offering to give it him, with 1s., but which his lordship refused to take in his hand; and that thereupon he, this deponent, put the said copy upon his lordship's arm, with the shilling, and *at the same time showed to the said Lord Adolphus

*399] Vane the original *subpœna*, and informed his lordship that it was the original *subpœna*, and he was thereby required to attend at the Court of Common Pleas, at Westminster, on Wednesday next, in a cause of Marshall v. the York, Newcastle, and Berwick Railway Company; to which his lordship replied, ‘Damn you, the court, and all of you:’ and that the deponent left the said copy *subpœna* so served upon the said Lord Adolphus Vane as aforesaid, and came away.”

There was also an affidavit of Marshall's attorney, in which the deponent stated, that, on the 8th of July, 1850, he received from Lord Adolphus Vane a letter as follows:—“I informed Marshall it was no use my attending on the trial in the action v. the York and Newcastle Railway Company, as I could give no evidence with regard to the trunk

lost, never having seen it. The only fact in my knowledge connected with it, was, that he *had* one. It would be of no use, therefore, your calling on me:" that, on the 12th of May, 1851, he wrote and sent a letter to Lord Adolphus Vane, as follows:—"We beg to inform your lordship that the cause of your late valet, Peter Marshall, against the York and Newcastle Railway Company, will come on on Wednesday next, and it is most likely to be first in the list. You will have, pursuant to the *subpœna* served upon you, to be at Westminster Hall by half-past 9 o'clock in the morning. In the event of your lordship not attending, you will be liable to an attachment for contempt of court, or such other remedy as the plaintiff can enforce:" that, in answer to this letter, the deponent received from Lord Adolphus Vane a letter, as follows:—"In answer to your letter, I beg to inform you no *subpœna* was served on me personally,—secondly, I know nothing of the case, having been applied to last year, and having refused on the same grounds,—thirdly, as to character to *Marshall as a servant, my testimony would be much more damaging than beneficial:" and that, [*400 in answer to that letter, the deponent wrote and put into the post just before half-past 5 o'clock of the 13th of May, a letter, as follows:—"We are sorry to inconvenience you; but we cannot do without your lordship; and we again repeat you must attend, at half-past 9 o'clock to-morrow morning, at the Court of Common Pleas, Westminster." The affidavit further stated, that Lord Adolphus Vane was a material witness, and deponent was advised by counsel, and believed, that the plaintiff could not safely proceed to trial in his absence; and that, on the 14th of May, before the jury were sworn, his lordship having been duly called upon his *subpœna*, and not appearing, the deponent, under the advice of counsel, withdrew the record.

Peacock and *Manisty* now showed cause.—They produced an affidavit of Lord Adolphus Vane, and also of his groom, and of the porter at Holderness House. The affidavit of Lord Adolphus Vane stated, that, on the 8th of May last, as the deponent stepped out of his cabriolet at the door of Holderness House, and while proceeding to the door, he was accosted by a person whom he did not then know, but whom he believed to be the deponent Joseph Oakes; that Oakes inquired of the deponent whether he was Lord Adolphus Vane, to which the deponent replied that he was, adding, "What is that to you?" or words to that effect; that Oakes thereupon produced and presented to the deponent a note or envelope, and at the same time informed him that it related to the action between his late valet, Peter Marshall, and the railway company; that Oakes did not upon or previously to presenting the said note or envelope make any observation, save as aforesaid; that the deponent having sometime in the previous year corresponded, on the subject of such an action, with Marshall's attorneys,

*401] *and considering that the matter, so far as concerned him, the deponent, had then ended, and not wishing to be troubled with any further correspondence upon the subject, he refused to receive, and did not receive, the said note or envelope, when so presented to him, but, as the door had in the mean time been opened by the hall porter, the deponent, after informing Oakes that he declined to have anything to do with the matter, proceeded to enter the house, and, as he was so entering, Oakes did place, or attempt to place, upon the deponent's arm the said note or envelope, and that the same thereupon fell to the ground, and the deponent passed into the house without having received the said note or envelope, and *without possessing any knowledge of the contents thereof, save as aforesaid*; that the deponent positively denied that Oakes did at that time, or at any other time, show him any original *subpœna*, or any document whatever other than the said note or envelope; nor did Oakes mention or refer to any original *subpœna*, or inform the deponent that the document so presented by him was, or that it contained, a copy of a *subpœna*, or that he was thereby required to attend at the Court of Common Pleas at Westminster on Wednesday then next, or at any other time; that the deponent also positively denied, that, during the said interview, or at any time, he, the deponent, said to Oakes that he would not attend as a witness in the said cause; that he further positively denied that he said to Oakes, either upon the occasion in question, or at any time, "Damn you, the court, and all of you," or that he made use of any words or expressions referring either contemptuously or otherwise to the court, or the process or authority thereof; that Oakes did not, upon the occasion in question, or at any time, produce or show to the deponent any copy of a *subpœna*, or any shilling, or state that he had a copy of a *subpœna*, or a shilling, for the

*402] deponent, or make *any reference whatever either to a *subpœna*, or copy of a *subpœna*, or to any shilling; that, without any intentional delay, and without any procurement on his part, the letter from Marshall's attorneys to the deponent, dated the 13th of May, and wherein it was stated that they could not do without the deponent, did not reach his hands, or come to his knowledge, till after half-past 10 o'clock on the 14th; that, when the said note or envelope was so as aforesaid presented to the deponent, he felt annoyed at being troubled with any further correspondence on the subject of Marshall's action, and that he did hastily make use of some offensive expression (the exact words of which he did not recollect) with reference to Oakes; but the deponent denied, that, upon the occasion in question, he made use of any expression whatever of any kind with reference to this court, or to any other court, or to the process of any court. The groom's affidavit confirmed the statement in Lord Adolphus Vane's affidavit, as to the nature of the document which was tendered to his lordship on the occasion in question, and also as to the denial of the unseemly

language imputed to him; and it further stated, that the "note or envelope" remained on the ground after the hall door was shut and the deponent drove away. The porter's affidavit in like manner confirmed Lord Adolphus Vane's statement, and negatived the use by him of any contemptuous expressions respecting the court or its process.

It was submitted on the part of Lord Adolphus Vane, that the affidavits upon which the rule was founded, were answered. [JERVIS, C. J.—His lordship purges himself from the contemptuous language imputed to him: but he does not very precisely deny the service.] To found a motion of this nature, the service must be personal. [CRESSWELL, J.—Is not the giving the witness a copy enclosed in an envelope personal service?] In *Jacob v. Hungate*, 3 Dowl. P. C. 456, it was held that a rule nisi for an *attachment against a witness will be discharged [*403] *with costs*, if it is denied that the original was shown at the time of the service. [JERVIS, C. J.—The plaintiff may have a perfect cause of action against the witness for not attending, and yet the circumstances may not justify an attachment for contempt.]

Denman, in support of the rule.—A service like this, where the party improperly declines to receive the process, or evades the usual mode of service, has repeatedly been held equivalent to personal service. Nobody can doubt, even upon Lord Adolphus Vane's own affidavit, that he knew perfectly well what the document tendered to him, and which he so uncourteously rejected, meant. He has not, it is submitted, even purged himself from the contempt.

JERVIS, C. J.—To found a motion for an attachment against a witness for disobeying a *subpœna*, it must be shown that he has wilfully abstained from attending in pursuance thereof, or that he has in some way treated the process of the court with contempt; and it must also appear that the original writ of *subpœna* was shown to the party at the time the copy is served upon him. Lord Adolphus Vane expressly denies that the original writ was ever shown to him, or any allusion made to it. That part of the application, therefore, is answered. As to the contemptuous expressions imputed to him, also, I think the affidavits upon which the rule was moved, are sufficiently answered. It does not, however, follow, that, because we think the witness is absolved from the charge of intentional disrespect to the process of the court, he may not be liable to an action for any injury which the plaintiff may have sustained in consequence of his non-attendance. His affidavit shows that he must have known *that he was wanted to give evidence. [*404] The rule must be discharged.

MAULE, J.—I also think that this rule must be discharged. This is not an application which requires the court to decide whether or not Lord Adolphus Vane is liable to make compensation to the plaintiff for any loss he may have sustained in consequence of the failure of his

lordship to attend at the trial. There is another and more appropriate mode of obtaining compensation for that. *Needham v. Fraser*, 1 C. B. 815 (E. C. L. R. vol. 50), 3 D. & L. 190, is a modern instance of that in this court. I must confess I think the *subpœna* was so served here as to render this witness civilly responsible. This application, however, is founded upon an imputation of conduct on the part of Lord Adolphus Vane, with reference to the administration of justice, which, if satisfactorily made out, would render him obnoxious to the penal process of the court. If this rule were made absolute, in no stage of the proceedings would the injury to the plaintiff be the direct measure of the punishment to be awarded: but the true measure would be, the degree of disrespect shown to the court. We do not decide anything detrimental to the right of the plaintiff to sue for compensation, when we decline to punish the party in this way: all we decide, is, that there is nothing which calls upon us to vindicate the authority of the court. Even though the plaintiff suffers no mischief at all, a witness who defies the power of the law is liable to punishment. The foundation of the application is, a defiance or contempt of the process of the court, to which all the subjects of the realm, however high their station, owe implicit obedience. If a party really and honestly believes that he

*405] has not been duly served, and under that belief abstains from attending, he is not liable to an attachment. It seems to me that the substance of the case as here presented upon the affidavits upon the one side and upon the other, is, that Lord Adolphus Vane was so served as to render him liable to an action, but that he believed he was not duly and *personally* served, and therefore might, without disrespect to the court, absent himself. Although I agree with my lord chief justice in thinking that this rule should be discharged, I think it ought to be discharged without costs; for, it seems to me that there has been a sufficient approximation to the offence imputed as to disentitle the witness to the costs of showing cause against the rule.

CRESSWELL, J.—I also think this rule should be discharged without costs. Lord Adolphus Vane has by his affidavit cleared himself from the imputation of intentional contempt of the process of the court, however he may have exposed himself to an action for any damage the plaintiff may have sustained by his refusal to attend as a witness.

TALFOURD, J.—I am of the same opinion. To ground an attachment for disobedience of a *subpœna*, it is clear that the original writ must have been shown at the time of the service. Whether that was done here is at least doubtful: and on that ground I think the motion fails.

Rule discharged, without costs.

***JANES v. WHITBREAD and Others. May 29. [*406**

A trader assigned all his property and effects to a trustee for the benefit of his creditors,—the trustee being therein described throughout as “James James, of, &c., tailor,” but executing the deed by his true name of “James Janes:”—Held, that the misdescription did not prevent the property from passing to him.

An assignment of all a trader's effects, *bond fide* executed, to a trustee for the general benefit of all his creditors, is not void, either at common law or under the statute 13 Eliz. c. 5, though it contains a clause empowering the trustee to employ the grantor, “or any other person or persons, in winding up the affairs of the grantor, and in collecting and getting in his estate and effects thereby assigned, and in carrying on his trade, if thought expedient by him”—if (distinguishing it from the deed in *Owen v. Body*, 5 A. & E. 28, 6 N. & M. 448) it appears from the whole scope of the deed, that the carrying on the trade was merely subsidiary to the general purpose of sale and distribution.

Where a new trial of an *interpleader issue* is rendered necessary by the miscarriage of the jury, the general rule as to costs prevails: *aliter*, where by the misconduct of the party.

THIS was a feigned issue under an order made by WIGHTMAN, J., at chambers, under the interpleader act, by which the question to be tried, was, whether certain goods which had been seized by the sheriff of Bedfordshire under an execution at the suit of the defendants against one James Ellis, were at the time of such seizure the property of the plaintiff, who claimed them under an assignment from Ellis.

The cause was tried before MAULE, J., at the second sitting in Middlesex in Easter term last. The facts were as follows:—An action having been brought against Ellis at the suit of Whitbread & Co., Ellis, on the 10th of February last, with a view to defeat their execution, executed to the plaintiff an indenture of assignment of all his property for the benefit of his creditors. That indenture purported to be made between James Ellis, of the first part, the plaintiff,—therein described as James James, of No. 76, Westmoreland Place, City Road, tailor,—as trustee for himself and the rest of the creditors of James Ellis, of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being respectively creditors of the said James Ellis, of the third part. It recited that James Ellis, *being indebted to the parties thereto of the second and third parts, in the several sums set opposite to their respective names [*407 in the schedule thereto, which he was unable to pay in full, had therefore proposed and agreed to assign all his estate and effects unto the said “James James,” as trustee for the benefit of his creditors, as thereafter mentioned; and witnessed, that, in pursuance of the said agreement, he, the said James Ellis, by those presents sold, assigned, &c., to the said James James, all the stock in trade, goods, wares, merchandise, furniture, fixtures, &c., and all other the personal estate and effects of him the said James Ellis in possession or reversion, &c., to have and to hold unto the said James James, his executors, &c., absolutely, upon trust to collect and receive, sell, and dispose of the said thereby assigned premises, and every part thereof, either by public sale

or by private contract, and in one or more lot or lots, with liberty to give any credit for the same, or to take any security for the purchase-money, or any part thereof, as to the said trustee, his executors or administrators, should seem proper; and upon trust out of the moneys to be received by virtue of the said indenture, to pay all the costs and expenses of preparing and executing the same indenture, &c., and, in the next place, to pay, retain, and satisfy, rateably and proportionably, and without any preference or priority, to himself, the said James James, and his partners, and the other persons parties thereto of the third part, the several debts or sums set opposite to their respective names in the said schedule thereto, subject to the covenants thereafter contained for verifying the amounts thereof, and to pay the residue, if any, of the said moneys unto the said James Ellis, his executors, &c. Then came the following proviso:—"Provided always, that it shall be lawful for the said trustee to make to the said James Ellis such allowance, or retain to him such part of his household furniture or effects, not *exceeding the value of 20*l.*, as he may deem
 *408] expedient; and also to employ the said James Ellis, or any other person or persons, *in winding up the affairs of him, the said James Ellis, and in collecting and getting in his estate and effects hereby assigned, and in carrying on his trade,*(a) if thought expedient by him; and to allow to the said James Ellis, or any other person or persons so employed as aforesaid, out of the said trust estate, such sum and sums as to the said trustee shall seem proper." The indenture then contained a power of attorney to the trustee to sue for and receive the debts, &c., together with a proviso and agreement between the parties thereto, that it should be lawful for the trustee, at the expense of the said trust estate, to cause the amount of any debt or debts of any or either of the several creditors parties thereto, to be verified by solemn declaration, or in such other manner as to the said trustee should seem expedient, and, in the event of any such creditor or creditors refusing or failing so to verify his, her, or their debt or debts, then that such creditor or creditors so refusing or failing as aforesaid should lose all benefit, dividends, and advantage to be derived from or otherwise claimed under the said indenture, anything therein contained to the contrary notwithstanding; and thereupon the said trustee was thereby authorized and empowered to pay such last-mentioned dividends unto the said James Ellis; and the said trustee was authorized and empowered to pay, or make such arrangements with the creditors whose debts were under 20*l.*, as he, the said trustee, might deem expedient. Then followed a proviso, that any resolution signed by the majority in number and value of the creditors parties thereto, should be binding on all the parties thereto, and should be effectual for the allowance and passing

(a) That of a licensed victualler.

of the accounts of the said trustee, *and for discharging him from the trusts thereof, and from all claims and demands in [*409 respect thereof; and that all questions relating to the same should be decided according to the English bankrupt law. The indenture then concluded with a release to James Ellis by his creditors parties thereto, subject to a proviso that the same should be void, in case he had concealed or kept back any part of his estate and effects to the value of 20*l.*, except the linen and wearing apparel of himself and his family.

The indenture was executed by the now plaintiff, by his true name of James Janes, and also by James Ellis, but not by any others of the creditors: and it did not appear that anything had been done upon the deed,—which continued in the possession of the attorney who drew it.

A *fi. fa.* at the suit of Whitbread & Co. was issued to the sheriff of Bedfordshire on the 3d of March, 1851; on the 4th, the levy was made; and, on the 6th, the sheriff and Whitbread & Co. had notice from Ellis's attorney that the goods seized under the *fi. fa.* were the property of "James Janes," under an assignment executed by Ellis on the 10th of February last for the benefit of his creditors, and that the trustee had accepted the trust.

An interpleader summons was thereupon taken out, and in the result this issue was directed.

On the part of the defendants, it was contended, on the authority of *Owen v. Body*, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448 (E. C. L. R. vol. 28),—where it was held that an assignment to trustees for the benefit of all creditors who may execute the deed, is not valid as against creditors who do not execute, if it authorize the trustees to carry on the debtor's trade, and contain such terms that the creditors subscribing would become partners in *the business,—that this [*410 assignment was void: and, further, that the plaintiff was precluded from recovering under the deed, by reason of the misdescription therein.

The learned judge left it to the jury to say whether the indenture was executed *bond fide* for the general benefit of the creditors of Ellis. The jury having found that it was executed *bond fide* for the general benefit of the creditors, his lordship directed a verdict to be entered for the plaintiff, reserving to the defendants leave to move to enter a verdict for them, or a nonsuit, if the court should be of opinion that the conveyance was void, or that the misdescription of the trustee in the body thereof precluded his right to recover under it.

Montagu Chambers, in Easter term last, accordingly moved to enter a verdict for the defendants, or a nonsuit, or for a new trial on the ground that the verdict was against the evidence.—The case of *Owen v. Body* is decisive to show that a deed like this, which would make all the creditors who executed it partners in carrying on the debtor's trade,

is void against creditors who are no parties to it. It is void by the common law, and also by the statute 13 Eliz. c. 5. [WILLIAMS, J.—It is usual, notwithstanding that case, to insert such a clause in all deeds of this sort.] The deed purports to convey the property in question to James James, and not to the plaintiff. [JERVIS, C. J.—I remember a case where one John Gerrard executed a deed in which he was described as Gerrard Gerrard: and Lord TENTERDEN held it good, the party being estopped by his execution of the deed from objecting to the misdescription.] The doctrine of estoppel does not apply with regard to a creditor and a third person. There is no proof that there was any grantee at all. [CRESSWELL, J.—Suppose, between the *411] *drawing and the execution of the deed, the party had changed his name,—which he may do so often as he pleases, provided no fraud be intended,(a)—and he executed it in his new name, would that be a good execution?] Evidence of identity would be required. In Sheppard's Touchstone, 233, it is said: “The name of the persons in grants is set down only to distinguish persons, and to make the person intended certain; and therefore, howsoever it be most safe to describe the person by his true and proper name of baptism, and also by his surname, and, if it be a corporation, by the true name whereby the corporation is made, yet mistakes in this case, unless they be very gross, will not make void the grant. *Nihil facit error nominis cum de corpore constat*. And therefore, if one that is a bastard hath gotten a name by reputation in the place where he doth live, or another man hath gotten another name by common esteem than his own right name, —Sir Moyle Finch's case, 6 Co. Rep. 63,—or is usually called by another name than his true name in the place where he lives; in these cases they may grant by his name, and the grant is good. And, if a man be baptized by one name, and after be confirmed by another, some have said he may grant by either of these names. *Sed quære*. And, if John at Stile grant by the name of William at Stile, this grant is good. *Et sic de similibus*. And these grants are good especially, when there is some other addition to make it more certain; as, when a duke, marquis, earl, or bishop, grant by their names of honour or dignity, and grant without any name, or with a false name, of baptism; as, when the Duke of Suffolk, by the name of the Duke of Suffolk, *412] without any more words, or by the *name of William, Duke of Suffolk, when his name is John, or the Bishop of Norwich, grant so; these are good grants, because there is but one such duke, and one such bishop, within the kingdom.” [JERVIS, C. J.—And here there is but one such tailor, of No. 76, Westmoreland Place, City Road.] All these instances are in the cases of grantors, and turn upon mistakes in the Christian name. Again Sheppard says, p. 234, —“But, if an ordinary man grant by his surname only, without any

(a) See Davies, dem., Lowndes, ten., 2 Scott, 203.

name of baptism, or by his name of baptism, without any surname at all; in these and such like cases, for the most part, the grant will be void for incertainty; unless there be some other matter in the deed to help it, or some matter done *ex post facto* to supply it." [WILLIAMS, J.—At page 236, Sheppard says: "Regularly, it is requisite that the *grantee* be named by his names of baptism and surname, and so it is most safe; and special heed must be taken to the name of baptism, for that a man cannot have two or more names of baptism, as he may of surnames.(a) And yet, in some cases, though the name be mistaken, the grant is good; as, if a grant be to J. S. and Em his wife, and her name is Emelin; or a grant is made to Alfred Fitzjames by the name of Etheldred Fitzjames; or a grant be to Robert Earl of Pembroke, where his name is Henry; or to George Bishop of Norwich, where his name is John; or a grant be to a mayor and commonalty, or a dean and chapter, and mayor or dean is not named by his proper name; or a grant be to J. S., wife of W. S.,(b) where she is sole; all these and such like grants are good; for, in this case, the rule doth hold, *utile per inutile non vitiatur*."]]

It was also suggested that one of the jurymen had misconducted himself; and the case of *Manley v. Shaw*, 1 C. & Marsh. 861 (E. C. L. R. vol. 41), *was cited: the rule, however, upon this point, was [*413 not pressed.

JERVIS, C. J.—As to the misdescription of the plaintiff in the deed, the court entertains no doubt. The grantee is described throughout the deed as "James James," as of a certain place, and of a certain calling; and he executes it by his true name of "James Janes." We think he is estopped from denying that he entered into the covenants in that deed. As far as the grantee is concerned, the question is one of identity only: and that is sufficiently made out. As to the other point, the case of *Owen v. Body* does not seem to have been much followed: but, in deference to that case, we think the rule may go.

Miller, Serjt., and *R. B. Miller*, now showed cause.—The rule was obtained on two grounds,—first, that inasmuch as the deed under which the plaintiff claimed contained a clause empowering the trustee to carry on the assignor's trade, the assignment was void, upon the authority of *Owen v. Body*,—secondly, that the verdict was against evidence. 1. The clause in question has not, it is submitted, the effect of making all the creditors who become parties to the deed, partners in the trade, as is suggested on the other side: it was a provision inserted as auxiliary to the winding up the affairs; it gave the trustee no power which he would not have possessed independently of it. Upon this ground, the case is distinguishable from *Owen v. Body*. The words of the deed in that case are very much larger than those of the present deed. The goods there were not conveyed to the trustees for the mere purpose of sale and distribution: the deed provided that the trustees, or the survivor

(a) Godb. 17; 3 Newn. 38.

(b) Hobart, 32.

of them, his executors, &c., should, so long as they or he should think it most desirable and advantageous so to do, *continue and carry
 *414] on the business of Marchetti in and upon the dwelling-house and premises of Marchetti, in their or his names or name, or otherwise; and should pay and apply the moneys to arise and be produced by and from the ways and means aforesaid, in the first place in and towards paying the costs of those presents, and carrying the trusts thereof into execution, and in the next place should retain and pay unto themselves, their executors, &c., certain moneys, and in the next place should pay and satisfy all such sums of money as in their or his judgment should be necessary to be paid, laid out, or expended for rent, taxes, wages, insurance, or otherwise in the continuing and carrying on the business of Marchetti, and in *maintaining and keeping up the stock in trade, &c.* The reasons given for the judgment are by no means satisfactory. Lord DENMAN says: "On consideration, we think, that, upon the second ground of objection, this assignment was not good. The deed imposed such terms as might have constituted a partnership among the persons executing it; and there were terms to which the creditors were not *bound* to submit. The assignment, therefore, was invalid." That reasoning would invalidate every assignment made for the benefit of creditors: they are *never bound* to execute such a deed. Here, the whole object of the deed was the winding up the concern, and the equal distribution of the proceeds among all the creditors. 2. The finding of the jury,—which was clearly warranted by the evidence,—that the deed was executed *bond fide* for the general benefit of the creditors, is conclusive: the deed is binding and irrevocable, and no longer voluntary. *Harland v. Binks*, 20 Law Journ. N. S., Q. B. 126, is precisely in point. There, a deed of assignment of a debtor's personal property to a trustee
 *215] for the benefit of all his creditors who should execute or accede *to the deed, was *bond fide* made and executed by both the debtor and the trustee, and the property taken possession of under it, and afterwards the trustee, by his agent, communicated the contents of the deed, and all that had been done, to three of the creditors, each of whom expressed himself satisfied with the arrangement, but neither they nor any others of the creditors signed the deed, or did any act under it: and it was held, upon an interpleader issue between the trustee and a creditor at whose suit the property had subsequently been taken in execution, that the deed was valid and binding, and passed the property to the trustee as against such execution creditor, although not one of those to whom the contents of the deed had been made known. [MAULE, J.—In that case it was assumed that the execution of the deed was *bond fide* for the purpose of equal distribution among the creditors of the assignor: here, that is the very matter in question.]

Montagu Chambers and *Honyman* in support of the rule.—The deed in question is fraudulent and void under the statute 13 Eliz. c. 5, and

also at common law, and falls within the second resolution in *Twyne's Case*, 3 Co. Rep. 80, on the ground that there is a trust for the benefit of the donor, and not really for the benefit of the parties for whose benefit it is now pretended to be set up. The decision in *Owen v. Body* is a perfectly sound one; though the reasons are not given at length, they evidently proceeded on that ground. The present case does not substantially differ from *Owen v. Body*, which has been repeatedly cited without disapprobation. Here, the deed gives the most extensive powers to the trustee, to trade in the usual manner, and to bind all the creditors who come in under it to the world as partners in the trade. In one *respect, this deed is even stronger than that in *Owen v. Body*; for, there, power was given to the major part of the [*416 creditors to interpose at any time, and prevent the trade from being continued: here, there is no such power. The mere absence of fraud will not prevent such a deed from being void under the statute. In *Doe d. Otley v. Manning*, 9 East, 59, it was held that a *voluntary* settlement of lands made *in consideration of natural love and affection*, is void as against a subsequent purchaser for a *valuable consideration*, though with notice of the prior settlement before all the purchase-money was paid or the deeds executed, and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction; for, the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the construction of the 27 Eliz. c. 4. [JERVIS, C. J.—The deed in *Owen v. Body* contemplated the doing of many things: but there must be some limit. The meaning of that case, I apprehend, is, that the deed was one which no creditor could in reason be expected to execute. MAULE, J.—All deeds of this sort are within *the letter* of the 13 Eliz. c. 5, s. 2, which declares that all deeds made to or for any intent or purpose before declared and expressed, shall be void,—that is, all deeds made to or for any of the intents or purposes mentioned in s. 1, viz. “to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, and debts,” &c. In *Pickstock v. Lyster*, 3 M. & Selw. 371, however, it was decided, that, if a man assigns all his property to a trustee *simply with the purpose of having it fairly distributed amongst all his creditors*, such an assignment, although it may have the effect of hindering and delaying a particular creditor of his execution, is not within *the *spirit* of the [*417 act, and therefore is not void,—because it does not deprive any of the creditors of his fair share of the debtor's property, if he chooses to become a party to the deed. The deed in *Owen v. Body* differed from ordinary deeds of this sort, on the ground that it was not simply an assignment for equal distribution, but one by which each creditor was to participate in the proceeds only on condition of his assenting to the trustees' carrying on the trade as they pleased, until interrupted

by the major part of the creditors. The observation of Lord DENMAN, which my Brother *Miller* professes not to understand,—that “the deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit,”—means no more than this, that the deed before him was not such a deed as it was reasonable to expect a creditor willing to take his fair share of the debtor's property, to accede to; just as an offer of payment accompanied by a requisition of a receipt in full of all demands, is not such a tender as the creditor is *bound* to accept,—that is, his position is not deteriorated by his rejection of it. In that case, there were large provisions for the carrying on the trade, and the creditors were to look to the future profits.]

JERVIS, C. J.—My Brother MAULE reports to us that he is not satisfied with the verdict, and therefore there must be a new trial. But, as this is an interpleader rule, we feel some difficulty as to the costs.

Chambers.—It seems to be a settled rule, that no costs on interpleader rules are allowed until the termination of the proceedings: *Hood v. Bradbury*, 6 M. & G. 981 (E. C. L. R. vol. 46), 7 Scott, N. R. 892. [MAULE, J.—That was an interlocutory motion.]

*418] *Honyman*.—By the 1 & 2 Vict. c. 45, s. 2, the costs are discretionary. [JERVIS, C. J.—That applies to the costs of the interpleader rule only, I apprehend.]

Bramwell, amicus curiæ, referred to two unreported cases,—*Gillingham v. Stuart*, in this court, and *Tyson v. Willis*, in the Court of Queen's Bench,—both interpleader rules, and in both of which the costs of the first trial were directed to abide the event of the second; but in both those cases it appeared that the first verdict had been obtained by fraud and perjury.

JERVIS, C. J.—This rule was obtained upon two grounds; the first being a question of law, whether the deed of assignment upon which the plaintiff relied was rendered inoperative and void, by reason of a clause therein empowering the trustee to carry on the trade; and the second ground being, that the verdict was contrary to the evidence. As to the first point, the court granted the rule expressly for the purpose of having the deed contrasted with that upon which the case of *Owen v. Body* was decided. Upon examining that case, however, I am of opinion that it is not applicable to the present; for, there, the deed contained minute provisions investing the trustees with power to carry on the trade, for which purpose they were authorized to lay out money in payment of rent, &c., and in keeping up the stock: and the court held the deed void, as being one which creditors could not reasonably be expected to become parties to. Here, however, the deed contemplates the sale of the property, and the winding up the business; and the power given to the trustee to carry on the trade, was evidently intended to be merely subsidiary to the winding up of the concern. Unless,

therefore, every deed of assignment for the benefit of creditors is to be held void, I think, for the reasons given by my Brother MAULE in the course of the argument, *that this deed is not void, and that we are well justified in holding the case not to be governed by Owen [*419]
v. Body. As to the other point, we all concur with my Brother MAULE in thinking the verdict not quite satisfactory, but that the ordinary rule as to costs should prevail. Two cases have been adverted to, for the purpose of showing, that, in interpleader cases, the question of costs is reserved until the result of the second trial. *Gillingham v. Stuart* seems to me not to be quite this case. The new trial was granted upon a suggestion that the verdict had been obtained by means of perjury: the costs were therefore properly made to abide the result of the further investigation. Whether or not that case was cited in *Tyson v. Willis*, does not appear: but, at all events, neither of those cases seems to me to be applicable here. The verdict in this case was the result of the miscarriage of the jury, without the default of either party. The ordinary rule, therefore, must prevail, viz. that the rule must be absolute for a new trial, upon payment of costs.

MAULE, J.—I also think, for the reasons already given, that this case is clearly distinguishable from *Owen v. Body*. What is there said by Lord DENMAN, understanding his language with a reasonable reference to what he is speaking about, lays down, I think, a sound and reasonable rule. The main object of the deed in that case was, the carrying on of an extensive business for the purpose of making money to pay the creditors who became parties to the deed. Here, the object is, merely to wind up the concern. That is a clear, plain, and intelligible distinction. The verdict was unquestionably against the evidence. I see nothing to take the case out of the general rule as to costs, which applies as well to trials of interpleader issues as to any other cases.

The rest of the court concurring,

Rule absolute for a new trial, on payment of costs.

See *Baxter v. Wheeler*, 9 Pick. 21; *Foster v. Saco Manufacturing Co.*, 12 Ibid. 451; *Cunningham v. Freeborn*, 11 Wendell, 240; *Murray v. Riggs*, 15 Johns. 571; *Austin v. Bell*, 20 Ibid. 442.

But the more general and better doctrine of the American Courts now is, that, any covenant or reservation for the benefit of the debtor directly or indirectly, renders the assignment void, so that though the assignees may in certain cases lawfully and safely employ the assignor, a reservation binding them to do so, will taint the whole instrument with fraud as

to creditors not parties to the assignment: *M'Allister v. Marshall*, 6 Binn. 338; *Harris v. Sumner*, 2 Pick. 129; *Mackie v. Cairns*, 5 Cowen, 547; *Thomas v. Jenks*, 5 Rawle, 221; *Richards v. Hazzard*, 1 Stewart & Porter, 139; *Hennessey v. The Western Bank*, 6 Watts & Serg. 300; *Whallen v. Scott*, 10 Watts, 237; *Strong v. Carrier*, 17 Conn. 319; *In re Wilson*, 4 Barr, 430; *Lockhart v. Wyatt*, 10 Alabama, 231; *Smith v. Leavitts*, Ibid. 92; *Planck v. Schermerhorn*, 3 Barbour, Ch. R. 644; *Litchfield v. White*, 3 Sandford, Sup. Ct. Rep. 545.

***420] WILLIAMS v. THE COMMISSIONERS FOR EXECUTING THE OFFICE OF LORD HIGH ADMIRAL OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND. June 16.**

By the 9th section of the 1 & 2 G. 4, c. 93, the principal officers and commissioners of the navy for the time being were empowered to bring and maintain any action of ejectment or other proceeding for recovering possession of lands, &c., vested in them, and to bring, maintain, or defend any other action in respect of the said lands, &c.; and it was enacted, that, in any such action, they should be called by the name of "the principal officers and commissioners of His Majesty's navy," without naming any of them; and that such action or suit should not abate by the death, resignation, or removal of such commissioners, or any of them.

By subsequent statutes, the powers and authorities of those commissioners were transferred to and vested in "the commissioners for executing the office of Lord High Admiral of the United Kingdom."

A writ of summons, addressed to "the commissioners for executing the office of Lord High Admiral of the United Kingdom," requiring them to appear in an action of debt at the suit of the plaintiff, was served upon A., one of the commissioners, and upon no one else.

Upon a motion, on behalf of A., to set aside the writ, and the copy and service thereof, for irregularity, the affidavits disclosed that the action was brought to recover arrears of half-pay alleged to be due to the plaintiff:—

Held, that it was not competent to the court, in dealing with such a motion, to enter into the consideration of whether the action was maintainable or not; for, that, inasmuch as the statute 1 & 2 G. 4, c. 93, s. 9, enabled some actions to be brought against the commissioners by the description contained in this writ, there was no irregularity in the process itself; and to determine, upon a summary application, that the cause of action was not within the statute, would be to deprive the plaintiff of his right to review their decision by writ of error.

The commissioners of the treasury are not a corporation: *semble*, therefore, that the proper mode of serving them with process would be by delivering a copy to each of them.

IN Easter Term last, a rule was obtained on behalf of Alexander Milne, calling upon the plaintiff to show cause why *the writ* of summons in this cause, and the service thereof on the said Alexander Milne, should not be set aside, for irregularity; or why *the copy* of the said writ of summons, and the service thereof, should not be set aside; and why the plaintiff should not pay to the said Alexander Milne, or to his attorney, his costs of and occasioned thereby, and of this application.

***421]** *The motion was founded upon the affidavits of Captain Milne, and of Mr. Robson, the attorney for the commissioners. The former in his affidavit described himself as "one of the commissioners for executing the office of Lord High Admiral of the united kingdom of Great Britain and Ireland," and stated that the copy of a writ of summons addressed to "The commissioners for executing the office of Lord High Admiral of the united kingdom of Great Britain and Ireland, respectively, of Whitehall, in the county of Middlesex," requiring them to appear to an action of debt, in this court, at the suit of Thomas Williams, was served upon him (Captain Milne) at the Admiralty, on the 9th of May, 1851. Mr. Robson's affidavit stated that "the present commissioners for executing the office of Lord High Admiral of the united kingdom of Great Britain and Ireland, are, The Right Hon. Sir F. T. Baring, Bart., J. W. D. Dundas, Esq., rear admiral of the

red squadron of Her Majesty's fleet, M. F. Fitzhardinge Berkeley, Esq., rear admiral of the blue squadron of Her Majesty's fleet, H. Stewart, Esq., captain in Her Majesty's navy, Alexander Milne, Esq., captain in Her Majesty's navy, and W. F. Cowper, Esq., all of whom were by letters-patent under the great seal, bearing date the 9th of February, 13 Vict., appointed to be commissioners for executing the office of Lord High Admiral of the united kingdom of Great Britain and Ireland; and that the commissioners for executing the office of Lord High Admiral of the united kingdom of Great Britain and Ireland, *are not a corporation, or body corporate, and have not any right, title, or authority, to sue or be sued as a corporation, or body corporate.*"

Roebuck, and *Byles*, Serjt., on a former day in this term, showed cause upon affidavits setting out the cause of action,—which was, for arrears of half-pay alleged to be due to the plaintiff as a naval surgeon,—and stating, *that, on the 23d of January, 1850, an action of [*422 debt was commenced against the commissioners, in the Court of Exchequer, at the suit of one Lieutenant Higginson, for arrears of half-pay, by writ of summons addressed to them in the same manner as the writ now in question; that the commissioners appeared and pleaded to that action, but afterwards paid the demand, with costs; that a second action was, on the 4th of April, 1850, brought by Higginson against the commissioners, in this court, by the same description, to which last-mentioned action they appeared and pleaded, and which now stands for trial; and that no attempt was made by the defendants in either of those causes to set aside the writ, either on the ground of irregularity, or under the pretence that the commissioners were not a body corporate.

The question is, whether the lords of the Admiralty can be sued as a corporation. By the 1 & 2 G. 4, c. 93, s. 9,(a) they are made a *quasi* body corporate, by the name of "the principal officers and commissioners of His Majesty's navy." [JERVIS, C. J.—For particular purposes only, viz., to maintain ejectments for lands vested in them by the 1st section, and to bring, prosecute, and defend actions or suits in relation thereto. CRESSWELL, J.—If they are only *quasi* a corporation, which of the incidents of a corporation have they?] The power to sue and be sued under the corporate name. If one dies, the corporate body still survives. [CRESSWELL, J.—It would have been unnecessary specially to provide that the death or resignation of one should not abate the action or suit, if they had been a corporation.] That is introduced *ex abundanti cautela*. Then comes the 7 & 8 G. 4, c. 65,—which passed at the time the Duke of Clarence held the office of Lord High Admiral,—by the 1st section of which it is provided "that all powers,

(c) See the section, post, p. 429.

*423] *privileges, authorities, jurisdictions, and exemptions given to, and all duties and obligations imposed upon, the commissioners for executing the office of Lord High Admiral for the time being, or any two or more of them, or given to or imposed upon any *other* person or *body corporate* in relation to the said commissioners, or any of them, by any act of parliament now in force, do extend and apply, and shall be deemed, taken, and adjudged to extend and apply, to the Lord High Admiral for the time being, and to such person or body corporate in relation to the Lord High Admiral for the time being, in like manner, and to all intents and purposes as if the Lord High Admiral had been expressly named in such act of parliament." The 2d section enacts "that all powers, privileges, authorities, jurisdictions, and exemptions given to, and duties imposed upon, the first commissioner of the Admiralty by any act of parliament now in force, shall extend and apply, and be deemed and taken to extend and apply, in like manner, to the Lord High Admiral for the time being." And the 3d section enacts, "that in all cases in which the signatures of any two or more of the commissioners for executing the office of Lord High Admiral would be sufficient, if the said office were executed by commissioners, to give effect to any commission, warrant, order, or other document whatsoever, the signature of any two or more of the council of the Lord High Admiral, affixed by his authority for that purpose, shall be taken and adjudged to have the like force and efficacy." The next act which has relation to this subject is, the 2 W. 4, c. 40, "An act to amend the laws relating to the business of the civil departments of the navy, and to make other regulations for more effectually carrying on the duties of the said departments." By the 1st section of that act it is enacted, that, in case His Majesty shall revoke the appointments of the commissioners of the

*424] navy and victualling, the powers and *authorities vested in them by any statutes shall be transferred to "the commissioners for executing the office of Lord High Admiral of the united kingdom of Great Britain and Ireland for the time being, and shall be vested in and exercised by them in as full and ample a manner, to all intents and purposes, as if they had been named in the said acts instead of the commissioners of the navy and for victualling," &c. The 2d section transfers all lands, &c., vested in the navy and victualling commissioners, to "the commissioners for executing the office of Lord High Admiral," for the time being. And the 3d section in like manner transfers to them all contracts. In the year 1833, the commissioners being desirous of purchasing land, an act passed, viz., the 3 & 4 W. 4, c. 65, giving them powers which necessarily made them a corporation. The 1st section enacts, "that the commissioners for executing the office of Lord High Admiral of the united kingdom of Great Britain and Ireland for the time being, shall be and they are thereby appointed commissioners for carrying the purposes of this act into execution, and all acts, matters,

and things authorized or necessary to be done or executed by the said commissioners in pursuance of this act, may be done and executed by any two of them, and the same shall be as valid and effectual as if done and executed by all the said commissioners." The 8th section empowers the commissioners to issue warrants, "under their hands and the seal of the office of Admiralty," to the sheriff, to summon a jury to assess the value of lands required by them under the act. The 10th section enacts, "that no person shall be heard before the said sheriff, or under-sheriff, or jury touching the matter of the inquiry, unless a previous notice in writing of fourteen days at the least before the taking of such inquisition shall be given to the said commissioners, or the solicitor of the Admiralty for the time being," &c. Section 21 provides for the payment to the *accountant-general of the Court of Chancery of all compensation money exceeding 20*l.*, to the credit [*425 of an account to be intituled "*Ex parte* the commissioners for executing the office of Lord High Admiral of the united kingdom of Great Britain and Ireland, in the matter of [as the case may be], at Woolwich." And the 28th section provides that no action shall be commenced against any person or persons for anything done in execution of the act, until after twenty-eight days' notice thereof given to the secretary of the Admiralty for the time being. Further, by the 7 W. 4 & 1 Vict. c. 3, the powers and authorities before existing in the postmaster-general under any contract for the conveyance by sea of mails and letters, are transferred to "the commissioners for executing the office of Lord High Admiral." These several provisions show conclusively that these commissioners are for all ordinary purposes connected with their office a body corporate. They use a seal, like any other corporation. [JERVIS, C. J.—They do not contract under seal only: two of them sign for the body.] The affidavits show that they themselves have acted upon the supposition that they were a corporation. [JERVIS, C. J.—Will a service on one of the commissioners enure as a service on the whole body?] It will. The commissioners clearly could sue a person contracting with them by their corporate name: why, then, should they not be sued in like manner? [JERVIS, C. J.—A person who has contracted with them by that name would probably be estopped. MAULE, J.—When you come to declare, it may be that you claim a sum of money by virtue of a deed under seal: and the defendants can only answer that by plea.] This rule seeks to set aside the writ of summons. Formerly, the remedy for a misdescription would be by plea in abatement; for which a process of amendment is now substituted. There clearly is no authority for this motion. If there is no such body *exist- [*426 ing as that against which the writ is directed, the party who seeks to set aside the writ is not called upon to appear. If a party enters into a contract by a wrong name, he must still be sued by that name: *Gould v. Barnes*, 3 Taunt. 504. In *Woolf v. The City Steam-*

boat Company, 6 D. & L. 606, 7 C. B. 103 (E. C. L. R. vol. 62), it was held, that, in a declaration against a corporation, it is sufficient to describe the defendants by their corporate title, without stating how they were incorporated. [JERVIS, C. J.—Here, it is stated upon affidavit that these commissioners are not a corporation.]

Crowder and Montagu Smith, in support of the rule.—The lords commissioners of the Admiralty are not a corporation against whom such an action as this can be brought. The 9th section of the 1 & 2 G. 4, c. 93, gives the commissioners certain rights and powers in reference to the acquisition and tenure of land; but neither that nor any of the subsequent acts shows any intention on the part of the legislature to erect them into a body corporate for any other purpose. If it had been intended that they should have a general power to sue and be sued by the corporate name, there would have been the usual provision to that effect. The act authorizes the bringing of actions by the commissioners in that name in respect of causes of action arising out of the property vested in them, and to defend in cases of replevin; but it does not authorize the bringing of actions against them. If so, the party served had a right to come to the court to set aside the writ: he was not bound to wait till the plaintiff entered an appearance, and then come to set aside the appearance. [MAULE, J.—A service on Captain Milne is no service on the lords commissioners of the Admiralty.] Clearly not.

*427] The 13th section of the *uniformity of process act, 2 W. 4, c. 39, provides for the service of process upon corporations; but there is no act which provides for service upon such a body as a quasi corporation. [MAULE, J.—In Gilbert's History of the Common Pleas, —which is a book of very high authority,—it is said: (a) “The names of corporations are not arbitrary sounds merely so individuating, but have a certain and significant meaning; and, if that be kept to, though the words and syllables be varied, yet the body politic is very well named, for, then there is enough said to show that there is such an artificial being, and to distinguish it from others. The names of corporations are given of necessity, for, the name is as the very being of the constitution; and, though it is the will of the King that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; and it is no body to plead and be impleaded, to take and give, until it hath got a name; but natural persons can take before they come into being, and, when they are in being, before they have got a name; as, a remainder may be limited to the eldest son of J. S., but, if a remainder be limited to such a corporation as the King shall next erect, this is not good, though a corporation be erected before the particular estate be determined; for, this body of men are only capable of taking by the name in the patent.” According to *Woolf v. The City Steamboat Company*, the court must take

(a) Page 225; cited, *Vin. Abr. Corporations* (G. 4), pl. 22.

notice that "the lords commissioners of the Admiralty," means a corporation consisting of the individuals who fill that office. They might, perhaps, come and move to set aside the declaration, on the ground that a service on Captain Milne was not a service on them. If all were served, perhaps they would be put to their plea of *nul tiel corporation*. JERVIS, C. J., *referred to *Chabot v. Lord Morpeth*, 15 Q. B. 446 (E. C. L. R. vol. 69).] Captain Milne could not enter an appearance in his own name: the appearance must be according to the name in the writ; and he had no right to appear for the others. [MAULE, J.—If the counsel for the plaintiff had been heard, in *Woolf v. The City Steamboat Company*, they would probably have contended that the defendants were estopped by the appearance from saying that they were not a corporation.] Exactly so. The defendants were bound to come promptly, and were not bound to wait until an appearance had been entered for them. If this is not the proper stage at which to make the application, when can it be made? The plaintiff's own affidavits show that the action is one which cannot in any view be sustained.

Cur. adv. vult.

JERVIS, C. J.—This was a motion to set aside the writ of summons in this cause, and the service thereof on Alexander Milne, for irregularity. One of the points argued before us presenting some little difficulty, the court took time to consider its judgment. Three points were urged upon the argument. In the first place, it was said, that, if this was an action against the lords commissioners of the Admiralty personally, they could not be sued as a corporation, and therefore that the writ was irregular. It was further said, that, if the commissioners are sued as a corporation, the second branch of the rule ought to be made absolute, inasmuch as the service was irregular, the 13th section of the uniformity of process act, 2 W. 4, c. 39, requiring process against a corporation aggregate, to be served on "the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary of such corporation," and Captain Milne not *being head officer, treasurer, or secretary. But there was a third point presented on the part of the plaintiff: it was said that we have no right to enter into a consideration of the circumstances under which the action is brought; but that, upon a motion to set aside process for irregularity, we are to look merely to the process and to the circumstances attending the service. Upon the argument, it occurred to me that we ought to look at the affidavits, to see whether or not the plaintiff brought himself within the terms of the statute authorizing actions to be brought against the commissioners of the Admiralty. But, upon consideration, I think the impression I then entertained was wrong, and that the rule upon this ground must be discharged; for, I think it is safer to adhere to general rules, than to depart from them to suit each particular case. The foundation of the argument was this:—By the 9th section of the 1 & 2 G. 4, c. 93,

it is enacted that "it shall be lawful for the principal officers and commissioners of his Majesty's navy for the time being, and they are hereby authorized and empowered, to bring, prosecute, and maintain any action or actions of ejectment, or other proceeding at law or in equity, for recovering possession of any manors, messuages, lands, tenements, or hereditaments by that act vested in them as aforesaid [under s. 1], and to distrain or sue for any arrears of rent which shall have become, or should become, due for or in respect thereof under any parol or other demise from the said principal officers and commissioners, or any three or more of them, or from any person or persons on their behalf, or on behalf of his Majesty, and also to bring, prosecute, and maintain, or to defend, any other action or suit in respect of, or in relation to, the said manors, messuages, lands, tenements, or hereditaments, or of any trespass or encroachment committed thereon, or damage or injury done thereto; and that, in every *such* action or suit the said *430] principal officers and commissioners for the time being shall be called 'the principal officers and commissioners of his Majesty's navy,' without naming them, or any of them; and that no *such* action or suit shall abate by the death, resignation, or removal of such principal officers and commissioners, or any of them, any law, custom, or usage to the contrary thereof notwithstanding." The powers and authorities conferred by that statute upon "the principal officers and commissioners of his Majesty's navy," have, by subsequent statutes, which have been referred to in the course of the argument, been transferred to "the commissioners for executing the office of Lord High Admiral." Whatever "the principal officers and commissioners of his Majesty's navy" could do, and whatever could have been done against them, under the 1 & 2 G. 4, c. 93, may now be done by and against "the commissioners for executing the office of Lord High Admiral." Then, it is said, that, inasmuch as the commissioners may, under that statute, sue and be sued in an action of debt, and this being an action of debt, we have no right to look into the grounds and circumstances of the action, to see if it is one which can be sustained; but that we must take notice from the writ alone that the action is one of that class which may lie against the commissioners in their collective capacity. On the other hand, it is said that the statute does not authorize the bringing of actions against them in that name, though it authorizes them to sue: but I am of opinion, that, when the statute says that "in any *such* action or suit, the said principal officers and commissioners for the time being shall be called 'the principal officers and commissioners of his Majesty's navy,' without naming them, or any of them, and that no *such* action or suit shall abate by the death, resignation, or removal of such 'principal officers and commissioners, or any of them,' it means in every action which they shall bring, and *431] in every action *which they shall defend; and that they may well be made defendants in their collective name for any act done by

them as commissioners in any matter within the provision of that section. That being so, the question here is, not, whether *this* action can be maintained,—which I think it clearly cannot,—but whether we can look at the circumstances, and decide upon motion that this is not an action that is within the statute, and therefore that the service of the writ is irregular. If we were to decide, upon this motion, that the cause of action in respect of which the plaintiff sues is not within the statute, we deprive the plaintiff of his bill of exceptions, and of all opportunity to review our decision, by appeal to a court of error. This we ought not to do, even if we thought the case ever so clear. It was asked by the learned counsel for the defendants, when the application should be made, if not at this stage of the cause; and whether the plaintiff can proceed upon this service on one defendant only. To this I answer, that, without entering into the consideration of the mode of doing it, an appearance must be entered,—either by the defendants themselves, or by the plaintiff for them,—and then the objection may be made, by plea or otherwise; and it will be for the judge at the trial to determine whether the action is maintainable or not. It is not necessary to point out minutely what is the proper course to pursue. It is enough for the plaintiff to say that he founds himself upon the statute. And the defendants cannot call upon us now to prejudge the case, and to hold that this is not a cause of action within the statute. I therefore think the rule must be discharged; and, as it is an application to set aside proceedings for irregularity, and is moved with costs, the rule must be discharged with costs.

MAULE, J.—I am of the same opinion. The application is, to set aside the service of the writ of summons *for irregularity. The only question we can enter into upon such a motion, is, whether [*432 the service is regular or not. It appears from the statute 1 & 2 G. 4, c. 93, s. 9, that there are cases in which “the commissioners for executing the office of Lord High Admiral of the united kingdom of Great Britain and Ireland,” may be sued as such. Therefore, the plaintiff has sued out a writ which any subject has a right to sue out; and it is not competent for us now to decide on motion whether or not that writ is sued out for a cause of action in respect of which the defendants are liable to be sued. The writ, therefore, being regularly sued out, the question is, how it is to be served. The defendants are not, it seems, a corporation. If they were, the proper mode of serving the writ would probably be upon their head officer or secretary, pursuant to the 13th section of the 2 W. 4, c. 39. Though not a corporation, they are persons whom it is not necessary to mention by name in the writ; for, the 9th section of the 1 & 2 G. 4, c. 93, authorizes them to be sued in the name of “the commissioners for executing the office of Lord High Admiral:” and there is a further provision that the action shall not abate by the death, resignation, or removal of the commission

ers, or any of them. But that is all that the statute provides : it leaves all other proceedings untouched ; consequently, they must be regulated by the general law. When an action is brought against any number of persons mentioned in a writ, the proper way to serve them is, to serve each of them. Service upon one is not a complete service upon all ; but it is not therefore an irregular service. This motion, therefore, to set aside the service for irregularity, must fail : and it is the well understood practice, that a party who seeks to set aside proceedings for irregularity, if he chooses to ask for costs, does so at the peril of having to pay costs if his motion is unsuccessful ; because it might be, that, *433] if he had abstained from asking for costs, no *cause would have been shown. As to the absence of a cause of action, it seems to me, that, however clearly that might be made out, either upon affidavit, or by admissions, the court could not upon a motion of this sort take any cognisance of it : it has no bearing whatever upon the question ; nor ought it, I think, to influence our judgment as to the costs. It would be extremely inconvenient, and would necessarily tend to great prolixity in affidavits, to introduce such a practice. Other reasons might readily be urged ; but it is unnecessary to go into them in detail. It is enough to say, that, there being no irregularity in the writ, or in the service, so far as it goes, this rule must be discharged with costs.

CRESSWELL, J.—I do not differ in opinion from the rest of the court upon the matter of costs, though I must confess I should have had some hesitation on the subject, if my three learned Brothers had entertained a less strong opinion upon the subject. I also concur in thinking that the rule should be discharged,—though I desire not to be understood as committing myself to saying that the service was correct. That may be discussed at an ulterior stage of the cause.

TALFOURD, J.—I am of the same opinion. It has not been made out to my satisfaction that the service of the writ in this case has been irregular. And, although I certainly entertain a strong opinion that the plaintiff must fail in the action, I see no ground for setting aside the proceedings. In this we act upon the principle laid down by this court in *Davies dem.*, *Lowndes ten.*, 8 Scott, N. R. 539, which was an application to supersede a writ of right on the ground of its having issued after the 31st of December, 1834, the time limited by the 3 & 4 W. 4, c. 27, s. 36. *434] *The court, although they intimated a clear and decided opinion that the proceeding was a nullity, declined to set it aside upon motion, inasmuch as they would be thereby depriving the demandant of her writ of error. I entirely concur with the rest of the court in thinking that this rule should be discharged, and discharged with costs.

Rule discharged with costs.

DEWS v. RILEY. *June 17.*

The clerk of the county court is a mere ministerial officer, to carry into effect the order of the judge, and is not liable in trespass for the imprisonment of a party under a warrant of the court signed and issued by him in the mere performance of the duty cast upon him by the statute; although the order of the judge upon which the warrant is founded is bad,—e. g. that the debtor pay the debt at a future given day, or be imprisoned for thirty days.

In such case, the defence is admissible under "not guilty, by statute," by virtue of the 13 & 14 Vict. c. 61, s. 19.

The record of the proceedings in the county court, is, the entry directed to be made by the clerk, under the 9 & 10 Vict. c. 95, s. 111.

THIS was an action of trespass and false imprisonment against the clerk of the Whitechapel County Court of Middlesex.

The defendant pleaded "not guilty, by statute."

The cause was tried before MAULE, J., at the second sitting for Middlesex, in Easter Term last. The facts which appeared in evidence were as follows:—On the 23d of July, 1850, one Davis recovered a judgment in the Whitechapel County Court of Middlesex, against the now plaintiff, for 3*l.* 17*s.* debt, and 14*s.* 4*d.* costs, which he was ordered to pay by monthly instalments of 5*s.*, the first instalment to be paid on the 23d of August. The now plaintiff failing to make these payments, a judgment-summons was issued against him under the 98th section of the 9 & 10 Vict. c. 95, requiring him to appear in court on the 10th of October. The now plaintiff having failed to appear on the appointed day, the judge made an order, *which was proved from the minute-book of the court kept by the clerk, and which, after [*435 stating the particulars, the amount claimed, and the judgment, under the word "Order," contained the following entry:—"On the 17th of October instant, or thirty days' imprisonment for not attending." Payment not having been made in obedience to this last-mentioned order, the now plaintiff was arrested on the 5th of November, by one of the bailiffs of the court, upon a warrant under the seal of the county court, and signed by the defendant as clerk of the court.

The warrant recited the judgment and the judgment-summons, and then proceeded to state that "it was ordered by the judge of the said court, that the said defendant (the now plaintiff) should pay the said debt and costs, together with the costs of the above-recited summons and the hearing thereon, amounting together to the sum of 5*l.* 2*s.* 8*d.*, on the 17th of October, then instant, or be committed to Her Majesty's common gaol for debtors for the county of Middlesex, in Whitecross-Street, for the term of thirty days, according to the form of the statute," &c.; and concluded, in the usual form, with a direction to the gaoler, to keep him "for the term of thirty days from the arrest under this warrant, or until he shall be sooner discharged by due course of law."

The judge of the county court, who was called as a witness on behalf of the defendant proved, from a private memorandum, that he intended

the order to be for a commitment forthwith, with an understanding that the warrant should not issue for a week.

For the defendant, it was submitted, that, being a mere ministerial officer, and bound to carry into effect the orders of the judge, he was not liable in trespass.

On the other hand, it was insisted that the defendant could not protect himself by an order which the judge had no power to make; and that, at all events, the defendant should have justified.

*436] *The learned judge doubted whether there was sufficient evidence to fix the defendant; but he directed the jury to assess the damages for the plaintiff, reserving to the defendant leave to move to enter a nonsuit, if the court should be of opinion that the defendant was not liable, and that the defence was admissible under not guilty.

W. H. Watson, in the last term, accordingly, moved for a rule.—He submitted that the defendant, being a mere ministerial officer, and bound, under the 102d section of the 9 & 10 Vict. c. 95, (a) to enforce the order of the judge, could not be liable in trespass, even if there had been an excess of jurisdiction: *Houlden v. Smith*, 19 Law Journ., N. S., Q. B. 170; *Dicas v. Lord Brougham*, 1 M. & Rob. 309, 6 Car. & P. 249 (E. C. L. R. vol. 25). [JERVIS, C. J.—In the former of those cases, the judge of the county court was held liable in trespass, because he had no jurisdiction: in the latter, the judge was acting strictly within his jurisdiction.] The statute 42 G. 3, c. 85, s. 6, and the case of *Cobbett v. Grey*, 4 Exch. 729,† were also referred to.

A rule nisi having been granted,

*437] **Humfrey and Skinner*, on a former day in this term, showed cause.—The cases of *Ex parte Kinning*, 5 C. B. 507 (E. C. L. R. vol. 57), *Kinning v. Buchanan*, 8 C. B. 271 (E. C. L. R. vol. 65), 7 D. & L. 169, and *Abley v. Dale*, 10 C. B. 62 (E. C. L. R. vol. 70), 1 L. M. & P. 626, show that the warrant in question was illegal and bad. The memorandum of the judge showed that he meant to make a legal order, and that the illegality was the act of the defendant, whose duty it was, under the 111th section (b) of the statute, to enter the proceedings of the court:

(a) Which enacts “that, whenever any order of commitment shall have been made as aforesaid, the clerk of the said court shall issue, under the seal of the court, a warrant of commitment, directed to one of the bailiffs of any county court, who by such warrant shall be empowered to take the body of the person against whom such order shall be made; and all constables and other peace officers, within their several jurisdictions shall aid in the execution of every such warrant; and the gaoler or keeper of every gaol, house of correction, and prison mentioned in any such order, shall be bound to receive and keep the defendant therein until discharged under the provisions of this act, or otherwise by due course of law; and no protection, order, or certificate granted by any court of bankruptcy, or for the relief of insolvent debtors, shall be available to discharge any defendant from any commitment under such last-mentioned order.”

(b) Which enacts “that the clerk of every court holden under this act, shall cause a note of all complaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered, from time to time, in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted

Ely v. Moule, 20 Law Journ., N. S., Exch. 29. *Andrews v. Marris*, 1 Q. B. 3 (E. C. L. R. vol. 41), 1 Gale & D. 268, is very analogous to the present case: in that case, a court of requests act (a) enacted, that, when the commissioners should have made an order on a defendant for payment of money, the said commissioners present in court might award execution against the body or goods of such defendant; that thereupon the clerk of the court, at the prayer of the plaintiff, might issue a precept under his hand and seal, by way of *ca. sa.* or *fi. fa.*, to the serjeants of the court, who should execute the same; and that it should be lawful for the commissioners, if they should think fit, to order any debt due to the plaintiff to be paid by instalments, on such terms as might appear to them reasonable; and that it should also be lawful *for the said* [*438] **commissioners present in court*, on default in paying any such instalment, at the instance of the plaintiff, and *on due proof of such default*, to award execution against the defendant, or his sureties, for the whole debt, or such part as should remain unpaid, with such further costs *as should seem to them reasonable*, to be recovered in the same manner as the original debt: and it was held, that, after a simple award of execution, the clerk might issue a precept for carrying it into effect, without further intervention of the court: but that, where the commissioners had ordered the debt to be paid by certain instalments “or execution to issue,” the clerk could not, on default of payment, and application to him by the plaintiff, issue a precept for execution, without further intervention of the court; for, that the commissioners were required, when acting upon such default, to exercise judicial functions, which could not be delegated; and therefore, that the clerk, having made such precept, which had been executed, was liable in trespass, although the proceeding was conformable to the practice of the court, for, the court could not institute such a practice: but that the serjeant executing such precept was protected by it. In *Carratt v. Morley*, 1 Q. B. 18 (E. C. L. R. vol. 41), the *commissioners* were, under similar circumstances, held liable in trespass for proceeding without jurisdiction. [JERVIS, C. J.—There was a total absence of jurisdiction in those cases.] In *Clark v. Woods*, 2 Exch. 395,† a warrant issued by two justices of the county of Sussex, after reciting the making of a rate, the assessment of the plaintiff in the sum £ 17*l.* 19*s.* 6*d.* thereto, and his refusal to pay the same, and that Hosier and Woods, two justices, &c., had issued their warrant to levy the said sum of 17*l.* 19*s.* 6*d.*, and the further sum of 6*s.* *for costs* incurred in the premises, making in the whole the sum of 18*l.* 5*s.* 6*d.*, by distress, &c., **commanded the con-* [*439] *stable to apprehend and take the plaintiff to the house of correction, there to remain “until payment of the said sum:”* and it was

in all courts and places whatsoever, as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof.”

(a) 47 G. 3, sess. 2, c. lxxviii.

held, that the warrant was bad *in toto*,—the statute 43 Eliz. c. 2, s. 4, which gives a remedy for the levying of money assessed for poor-rates, not extending to *costs*, and the 18 G. 3, c. 19, s. 1, under which justices have power to award costs in such a case, limiting the period for which the defaulter can be imprisoned, to the term of one month,—and that an action of trespass lay *against the justice and the constable* for the arrest and imprisonment under it. Upon the authority of these cases, it is submitted, the defendant in this case is clearly and solely responsible for the imprisonment of the plaintiff under this illegal warrant; and that trespass is the appropriate form of remedy. The defendant has availed himself of the machinery of his office to issue a bad warrant, which is not justified by any previous order of the court. *Bryant v. Clutton*, 1 M. & W. 408,† is also an authority in favour of the maintenance of this action. [JERVIS, C. J.—Why should not the clerk, who is bound to issue the warrant, be in the same situation as the sheriff?] In issuing this bad warrant, the defendant was not obeying the direction of the judge. There is no plea of not guilty by statute given to the clerk, as there is to the bailiff, and those acting under him: 13 & 14 Vict. c. 61, s. 19.(a) At all events, it only applies to the clerk, where he is joined with the bailiff.

*440] *W. H. Watson and Manisty*, in support of the rule.—This defence is clearly open to the defendant under not guilty, whether “by statute” or not. [JERVIS, C. J.—We all think the 19th section of the 13 & 14 Vict. c. 61, embraces the clerk.] The judge of the county court had jurisdiction to hear the summons, and had power to award imprisonment for non-attendance. [JERVIS, C. J., referred to *Ex parte O'Neill*, 10 C. B. 57 (E. C. L. R. vol. 70), 1 L. M. & P. 737. The

(a) Which enacts, “that no action shall be brought against any high-bailiff or bailiff, or against any person or persons acting by the order and in aid of any high-bailiff, for anything done in obedience to any warrant under the hand of the clerk or clerks of the said court, and the seal of the said court, until demand hath been made or left at the office of such high-bailiff by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected by the space of six days after such demand; and, in case, after such demand, and compliance therewith, by showing the said warrant to, and permitting a copy to be taken thereof by, the party demanding the same, any action shall be brought against such high-bailiff, bailiff, or other person or persons acting in his aid, for any such cause as aforesaid, *without making* the clerk or clerks of the said court who signed or sealed the said warrant defendant or defendants, that, on producing or proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction, or other irregularity in the said warrant; and, if such action be brought jointly against such clerk or clerks, and also against such high-bailiff, or bailiff, or person or persons acting in his or their aid, as aforesaid, then, on proof of such warrant, the jury shall find for such high-bailiff, or bailiff, and for such person or persons so acting as aforesaid, notwithstanding such defect or irregularity as aforesaid; and, if the verdict shall be given against the said clerk or clerks, that, in such case, the plaintiff or plaintiffs shall recover his, her, or their costs against him or them, to be taxed in such manner, by the proper officer, as to include such costs as such plaintiff or plaintiffs are liable to pay to such defendant or defendants for whom such verdict shall be found as aforesaid; and, *if any action shall be brought, the defendant or defendants shall and may plead the general issue*, and give the special matter in evidence at any trial had thereupon.”

19th section of the 13 & 14 Vict. c. 61, is not very intelligible. [JERVIS, C. J.—It seems to amount to a legislative declaration that the judges are not liable, or the bailiffs; but that the clerk is.] The true distinction is taken in *Houlden v. Smith*: where the judge has jurisdiction, he is *not* liable; but, where he acts altogether without jurisdiction, *he is* liable: *Calder v. Halket*, 3 Moore's P. C. Cas. 28; [*441 *Taaffe v. Downes*, Ib. 36, n.; but in neither case is the clerk, who acts merely ministerially, responsible in trespass: *Whitelegge v. Richards*, 3 Brod. & B. 188 (E. C. L. R. vol. 5), 6 J. B. Moore, 501 (E. C. L. R. vol. 17), 2 B. & C. 45, in error (E. C. L. R. vol. 9); *Buren v. Denman*, 2 Exch. 167.† *Andrews v. Marris* and *Carratt v. Morley* are no authorities against the present defendant: in the former, there was no order for imprisoning the party at all. [MAULE, J.—The clerk would be liable in trespass for issuing a warrant, where there was no judgment.] Clearly. But, suppose the judge makes an order that is void,—what is the clerk to do? Has he any authority to criticise the acts of his superior? In *Bushell's case*, 1 Mod. 119, a motion was made by Sir *William Jones*, for the Lord Mayor Starling and the Recorder Howell: one *Bushell* had brought an action against them for false imprisonment; and because the plea was long, he prayed he might have time to plead. HALE, C. J., said: “I speak my mind plainly, that an action will not lie; for, a *certiorari* and an *habeas corpus*, whereby the body and proceedings are removed hither, are in the nature of a *writ of error*; and, in the case of an erroneous judgment given by a judge, which is reversed by a writ of error, shall the party have an action of false imprisonment against the judge? No, nor against the officer neither. The *habeas corpus* and writ of error, though it doth make void the judgment, it doth not make the awarding of the process void to that purpose; and the matter was done in a course of justice: they will have but a cold business of it.” The like doctrine is laid down in *Hammond v. Howell*, 2 Mod. 218. Here, the imprisonment is the act of the court: all that the clerk does, is, the affixing the court seal to it. *Cooper v. *Harding*, 7 Q. B. 928 (E. C. L. R. vol. [*442 53), is also an authority to show that the present defendant is not liable in trespass. The sheriff is not liable for the wrongful act of the bailiff: *Tunno v. Morris*, 2 C. M. & R. 298.† Lord ABINGER there says: “The sheriff, if not the judge, is the assistant of the county court, and as much a constituent part of it as the entering clerk of a court of record. Nobody ever supposed that that officer would be liable for the mis-execution of its process.” [MAULE, J.—The 19th section of the 13 & 14 Vict. c. 61, contemplates an action which shall be brought jointly against the clerk and the person executing the warrant, and that the latter, on showing the process, shall have a verdict. Such a joint action as that must be case or trespass against the two. It *must* be *trespass* against the person executing the process: and therefore, of

course, trespass against both.] It is quite impossible to reconcile all the parts of that section: nor is it necessary in the present case to attempt it. *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court:

Upon the trial of this cause, my brother MAULE doubted whether there was sufficient evidence to fix the defendant, but directed the jury to assess the damages for the plaintiff, and gave the defendant leave to enter a nonsuit, if, upon consideration, the court should be of opinion that the defendant was not liable, and that the defence was admissible, upon the record.

The only evidence against the defendant, was, the warrant sealed and signed by him as clerk of the court. The defendant produced a minute of the proceedings at the court held on the 10th of October; which, after stating the particulars, the amount claimed, and the *443] judgment, under the word "order" contained the following entry:—"On the 17th October, instant, or thirty days' imprisonment, for not attending." The judge of the court proved, from a private memorandum, that he intended the order to be for a commitment forthwith, with an understanding that it should not be enforced till after the 17th of October.

By the statute 9 & 10 Vict. c. 95, s. 111, the clerk is directed to cause a note of all orders and proceedings of the court to be fairly entered in a book, and a copy of such entry, duly authenticated, is at all times to be admitted as evidence of such entry, and of the proceedings referred to by such entry, or of the regularity thereof. We are bound, therefore, by the copy of the entry so produced, and must assume, contrary to the evidence given by the judge, that the order was, that the present plaintiff should be imprisoned for thirty days, for not attending, unless he paid the debt and costs on or before the 17th of October.

According to the decisions of this court, confirmed in this respect by the court of error, this was a bad order; but it is correctly stated in the warrant; and the question is, whether the clerk of the court is liable in trespass. We are of opinion that he is not.

By the 102d section of the county court act, "where any order of committal shall have been made as aforesaid, the clerk of the court shall issue, under the seal of the court, a warrant of commitment," &c. It is said, that the words "as aforesaid," by reference to the preceding sections, require that the order should be in compliance with the terms of the act; and that this section is not obligatory upon the clerk where the order is bad and cannot be sustained.

This is not, in our opinion, the correct construction of the act. It would throw upon the clerk the duty of reviewing the decision of the *444] judge,—his superior officer. *The clerk is a mere ministerial officer, to carry into effect the order of the judge, and cannot be

liable in trespass for the mere performance of the duty cast upon him by the express language of the act of parliament. The case of *Andrews v. Marris*, 1 Q. B. 3 (E. C. L. R. vol. 41), 1 Gale & D. 268, cited in the argument for the plaintiff, is distinguishable, in several very material respects, from the present, and does not conflict with our decision. In that case, the local act empowered the commissioners, if they made an order or decree for payment of a sum of money forthwith, to award execution against the body or goods of the defendant; and thereupon the act required the clerk of the court to issue a precept under his hand and seal, by way of *capias ad satisfaciendum*, &c. If the commissioners thought fit to order payment by instalments, they might do so; and, if they adopted this course, the award of execution was to be made only in case of failure in payment of an instalment, and proof of that failure; upon which the commissioners present in court were empowered to award execution in manner aforesaid, for the unpaid residue of the debt, and for such further costs as to them should seem just and reasonable. It is clear, therefore, that, under that act, execution could not lawfully be awarded, after an order to pay by instalments, until proof had been made of the default before the commissioners present in court, who were to exercise a discretion as to costs. *In fact*, no proof of default had been made before the commissioners, and they had made no award of execution; for, the words "or execution to issue," at the end of the order for the payment by instalments, are clearly no award of execution, being silent as to the mode of execution, and the amount of either the sum of money or the costs for which it should issue, but amount to no more than a warning to the defendant, that, in *default of obedience to the order, execution may issue against him. The defend- [*445 ant Marris, therefore, in issuing the precept, acted without any order of the court requiring him to issue it: and, although it appeared that a practice had prevailed, with the concurrence of the commissioners, that the clerk should issue a precept in such a case, without any order, the defendant, in issuing it, was usurping a power which the commissioners could not confer upon him. In the case of *Andrews v. Marris*, also, the precept was under the hand and seal of the defendant; and, by that order, the defendant required the serjeant to arrest the plaintiff; and, if it had been made, as it professed to be made, by order of the court, it would have been correct. But, in fact there was no such order of the court: the defendant, therefore, had, in terms, ordered the arrest of the plaintiff without any authority to do so.

In the present case, the order of the court, as appears by the minute, is, that the plaintiff shall be imprisoned thirty days, if he do not pay 4*l.* 11*s.* 4*d.* debt, and 11*s.* 4*d.* costs, on the 17th of October. The warrant is under the seal of the court, and purports to be a command by the court, in strict conformity with the minute. It is, indeed, signed by the defendant, as "clerk of the said court:" but this seems only to

mean that he attests, in that capacity, that the warrant is the act of the court whose seal it bears.

In the case of *Andrews v. Marris*, therefore, the defendant in his own name ordered the arrest of the plaintiff, assuming to do so by force of an order of the commissioners, who in fact had made no such order. In the present case, the court did in fact order the arrest of the plaintiff; and the defendant did no more than authenticate the order as being the act of the court.

But it was said on the argument, that the clerk must at all events *446] produce evidence of the order, to bring *himself within the 102d section: and that, for that purpose, the order should have been specially pleaded: to which it was answered, that he was merely a ministerial officer, that he was not a trespasser, even though the judge might be, and that he was well defended under the general issue.

It is unnecessary to decide this question. The plea upon the record, is, "not guilty, by statute;" and the statute 13 & 14 Vict. c. 61, s. 19, applies to this case, and allows the defendant to plead the general issue, and give the general issue in evidence. Although the primary object of that section is, to protect high bailiffs, and their officers, it applies to actions brought against clerks jointly with high bailiffs and enacts generally, that, if any action shall be brought, the defendant or defendants shall and may plead the general issue, and give the special matter in evidence.

For these reasons, we are of opinion that the rule for a nonsuit should be made absolute. Rule absolute accordingly.

*447] *SCOTT v. Count JULES DE RICHEBOURG. *June 11.*

Costs of issues in fact found for the plaintiff, and costs of a judgment on demurrer given for the defendant, in the same suit, "are interlocutory costs," within the meaning of the 93d rule of Hilary Term, 2 W. 4, and may be set off against each other, without regard to the attorney's lien.

THIS was an action of debt, brought to recover 1000*l.* and interest due upon two bills of exchange for 500*l.* each, accepted by the defendant, and endorsed to the plaintiff. The declaration contained three counts,—the first two upon the bills respectively; the last upon an account stated. Upon the first and third counts, issues in fact were joined, which were tried at the sittings in London in Easter Term last, and a verdict found for the plaintiff, damages 513*l.* 10*s.* To the second count there was a demurrer, upon which the defendant had judgment.

The plaintiff's costs of the issues in fact were taxed on the 9th of May last, and an allocatur given for 56*l.* 1*s.*, and judgment was entered accordingly. The defendant's costs of the demurrer were also taxed on

the same day, and an allocatur given for 15*l.* 9*s.*, and final judgment was at the same time entered up for the same.

J. Brown, in the last term, obtained a rule calling upon the defendant to show cause why satisfaction should not be entered on the roll as to the judgment signed and entered up on behalf of the defendant, the plaintiff also entering satisfaction on the roll, for the like amount, in part satisfaction of the judgment recovered by the plaintiff against the defendant in this action. He cited *Burdon v. Flower*, 7 Dowl. P. C. 786, *Gregory v. The Duke of Brunswick*, 3 C. B. 481 (E. C. L. R. vol. 54), the 93d rule of Hilary Term, 2 W. 4, and the observations thereon in 1 Chitty's Archbold, p. 110, 8th edit.

**Hawkins* now showed cause, upon an affidavit of the defendant's attorney, which stated that application was made on the [*448 part of the plaintiff before the master, to have the defendant's costs deducted from the amount of the plaintiff's allocatur, but that the master declined to do so, conceiving that the defendant was entitled to a separate allocatur, to complete his judgment on the demurrer; (a) that the defendant was indebted to him (the attorney) in the sum of 200*l.* and upward for work and labour as an attorney, &c.; and that, if the set-off were allowed to the prejudice of his lien, he verily believed he would lose the amount thereof.

That which this rule seeks might be allowed if there were no intervening lien of the defendant's attorney. These are not interlocutory costs. There are two distinct judgments. [MAULE, J.—There can be no splitting of an action for the benefit of the attorney.] The 93d rule of Hilary Term, 2 W. 4,—which declares that “no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted,”—does not apply to costs of a judgment on demurrer, for which the defendant is entitled by the statute to a judgment: such costs cannot be *interlocutory*. [MAULE, J.—For this purpose surely they are interlocutory. The plaintiff has the judgment of the court.] Each party has a judgment: there would be error on the record, if a judgment for the defendant for the costs of the demurrer was not entered: *Gregory v. The Duke of Brunswick*. [JERVIS, C. J.—Suppose an action brought by A., against B. and C., and a verdict for A. against B., and a verdict in favour of C., might C.'s costs be *set off against the damages [*449 and costs recovered against B. ?]

J. Brown, in support of the rule.—The case just put was expressly decided in the affirmative in *George v. Elston*, 1 N. C. 513, 1 Scott, 518, 3 Dowl. P. C. 419. TINDAL, C. J., there says: “The 93d rule only applies to the set-off of damages or costs between the same parties

(a). Under the 3 & 4 W. 4, c. 42, s. 34.

in different suits: here the set-off sought is of costs incurred in *the same suit*. The case, therefore, rests upon the principle that obtained before the making of the rule. *Schoole v. Noble*, 1 H. Blac. 23, seems to me to decide the question. A pauper plaintiff is not to be permitted improperly to bring defendants before the court, and then turn round and say that the costs of those as against whom he is unsuccessful shall not be set off against his claim upon others of the defendants against whom he has obtained a verdict." And in *Lees v. Reffitt*, 3 Ad. & E. 707 (E. C. L. R. vol. 30), 5 N. & M. 340 (per nom. *Lees v. Kendall*) (E. C. L. R. vol. 36), the Court of Queen's Bench fully confirmed the case of *George v. Elston*. [MAULE, J.—I think this ought to have been done by the master by deduction at the time of the taxation. Where the set-off claimed is of a judgment for damages or costs in a different suit, inasmuch as that cannot be done without the intervention of the court, the court may properly withhold its sanction to that proceeding, unless the attorney's lien is saved. But, where the aid of the court is not invoked, it has no means of giving this protection to the attorney.] The master, upon the authority of *Gregory v. The Duke of Brunswick*, considered that the defendant was entitled to a judgment for his costs of the demurrer. [MAULE, J.—No doubt: still, the set-off might, I think, have been effected by the *allocatur*. JERVIS, C. J. *450] —The meaning *of the decision in *Gregory v. The Duke of Brunswick* is plain, from the language of PARKE, B., in giving the judgment. After referring to the 4 & 5 Ann. c. 16, s. 5, and the 3 & 4 W. 4, c. 42, s. 34, he says: "Though the object of the [latter] statute was, to provide for cases not included in the 8 & 9 W. 3, c. 11, s. 2, which had been construed not to extend to any cases except where the plaintiff would have recovered his costs if he had recovered, its terms are so general that there seems to be no question but that it gives a right to a judgment and costs in all cases of demurrer. It is impossible for us to take notice that the plaintiff has had those costs allowed by way of deduction out of the general costs given to the defendant; for, there is no averment on the record to warrant that presumption."] The rule as to the attorney's lien, is thus dealt with in Chitty's Archbold, vol. I. p. 110, 8th edit.: "The lien holds, as against the opposite party, to the extent of the attorney's costs of that cause only, the costs being calculated as between attorney and client. It also extends only to the balance which is ultimately to be paid over to the client upon the general and final result of the cause; and, whatever costs may be due to the opposite party in the particular cause, whether they are the costs of special issues found for him, or of interlocutory proceedings, he has a right to deduct them, without regard to the amount which may be due from the client to the attorney." The opinion intimated by COLERIDGE, J., in *Burdon v. Flower*, 7 Dowl. P. C. 786, is also in favour of the view now contended for. [MAULE, J.—It does not appear that my Brother

COLERIDGE'S attention was directed to the application of the rule to the attorney's lien.] It certainly was not. [MAULE, J.—The 93d rule of Hilary Term, 2 W. 4, assumes that only one party can be *entitled to the *final* costs. That explains the meaning of the [*451 word "interlocutory," in the proviso.](a)

JERVIS, C. J.—I am of opinion that this rule should be discharged. This court, in *George v. Elston*, determined that the 93d rule of Hilary Term, 2 W. 4, applies only to the set-off of damages or costs between the same parties *in different suits*: and that decision was recognised and acted upon by the Court of Queen's Bench, in *Lees v. Reffitt*. If that be the rule, there is nothing to prevent the court from ordering satisfaction to be entered in the manner here prayed. And this decision in no degree conflicts or interferes with that of the court of error in *Gregory v. The Duke of Brunswick*. It did not appear upon the record in that case that the plaintiff had any judgment for the costs of the demurrer which was decided in his favour. Here, however, it will no doubt appear, when the record is made up, that the defendant has had an award of costs on the demurrer, and that those costs have been paid,—by set-off against the damages and costs recovered by the plaintiff. I think we are bound to decide in conformity with *George v. Elston* and *Lees v. Reffitt*.

MAULE, J.—I am of the same opinion. I think the "interlocutory costs" mentioned in the 93d rule of Hilary Term, 2 W. 4, are, all the costs the right to which has accrued to either party before the final conclusion of the last stage of the suit,—that is, before the ultimate judgment of the court upon the whole record. Everything anterior to that, is, in my opinion, *"interlocutory," within the meaning of [*452 the rule: and I think it would be unjust if these costs were not allowed to be set off.

CRESSWELL, J.—I see no reason for dissenting from the opinion expressed by TINDAL, C. J., in the case of *George v. Elston*, and afterwards adopted by the Court of Queen's Bench in *Lees v. Reffitt*, that the 93d rule of Hilary Term, 2 W. 4, does not apply to a case of this sort.

TALFOURD, J., concurred.

Rule absolute.

(a) The following cases were also cited:—*Bridges v. Smyth*, 8 Bligh. 29 (E. C. L. R. vol. 21), 1 M. & Scott, 93 (E. C. L. R. vol. 28), 1 Dowl. P. C. 242, *Partridge v. Gardner*, 4 Exch. 303,† 2 L. M. & P. 371, and *Callander v. Howard*, 10 C. B. 302 (E. C. L. R. vol. 70), 1 L. M. & P. 755. See also *Partridge v. Gardner*, affirmed on error, 6 Exch. 621.†

SHELTON v. SPRINGETT. *June 17.*

The mere moral obligation on a parent to maintain his child, affords no legal inference of a promise to pay a debt contracted by him, even for necessaries.

ASSUMPSIT for meat, drink, washing, lodging, and other necessaries found and provided by the plaintiff for the defendant's son.

Plea, non assumpsit.

At the trial at the sheriff's court, London, on the 29th of May last, it appeared, that the plaintiff kept a coffee-house in the Minories; that the defendant, who was the manager of the Tenterden branch of the London and County Joint-Stock Bank, in April, 1850, sent his son, a youth of the age of twenty years, to London, to look out for a ship, giving him 5*l.*, and telling him to put up at an hotel called Burrell's Hotel, at which he himself was in the habit of putting up when he came to town; that, after staying at Burrell's Hotel for a week, at an expense of 3*l.* 9*s.* (which sum he procured from a friend of his father's), the defendant's son went to the plaintiff's coffee-house, and remained there fifteen weeks.

*453] The son, who was called as a witness, stated that he *went to the plaintiff's house without his father's knowledge; that he was recommended by some one to go there, as it would be more economical, and nearer to the docks than the house to which his father had desired him to go; that he had addressed two or three letters to his father, but had received no reply; that he could not say how he had spent the 5*l.* which his father had given him, but no part of it in board and lodging.

Some correspondence was then put in, but it contained nothing from which a contract or promise on the part of the defendant to pay for his son's board and lodging, could be implied.

For the defendant it was submitted, on the authority of *Mortimore v. Wright*, 6 M. & W. 482,† that the moral obligation which a father is under to provide for his child, imposes on him no liability to pay the debts incurred by the child; and that he is not so liable, unless he has given the child authority to incur them, or has contracted to pay them: and, consequently, that here there was no case to go to the jury.

On the other hand, reliance was placed upon *Baker v. Keen*, 2 Stark. N. P. C. 501 (E. C. L. R. vol. 3), where it was held, that, where a minor orders articles which are necessary, and suitable to his situation in life, it is a question for the jury, under all the circumstances of the case, whether they can infer an authority given by the father to the son so to contract.

The under-sheriff, reserving to the defendant leave to move to enter a nonsuit, left the case to the jury; telling them that it was incumbent on the plaintiff to show that the defendant had given authority to the

son to pledge the defendant's credit, and that the board and lodging had been supplied on the credit of the defendant.

The jury returned a verdict for the plaintiff, damages 15*l.* 15*s.*

**Needham*, on a former day in this term, obtained a rule nisi to enter a nonsuit, on the ground urged at the trial. [*454]

Byles, Serjt., and *Charnock*, now showed cause.—There was some evidence to go to the jury. *Law v. Wilkin*, 6 Ad. & E. 718 (E. C. L. R. vol. 33), 1 N. & P. 697 (E. C. L. R. vol. 36), W. W. & D. 235, which, it is conceded, cannot now be supported to the full extent, shows that *very slight* evidence will suffice to fix the parent in such a case. [JERVIS, C. J.—If that case be any authority, you might almost say that a total absence of evidence will do. And the same may be said of *Baker v. Keen*.] *Blackburn v. Mackey*, 1 C. & P. 1 (E. C. L. R. vol. 12), is also an authority to show that almost any evidence will warrant a jury in implying that the infant's contract is sanctioned by the father, whose moral duty it is to supply his child with necessaries. The only evidence in that case was, a passage in a letter written by the father after the debt was contracted, in which he says—"I have no great objection to paying your first bill, if you will send a friend with a receipt." [MAULE, J.—It must, I think, have been clear to any one but the jury in that case, that the father was repudiating his liability with the utmost indignation.] No doubt, the doctrine laid down by Lord ABINGER in *Mortimore v. Wright*,—that, "if a father does any specific act, from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted: but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts; and we ought not to put upon his acts an interpretation which, abstractedly, and without reference to that moral obligation, they will not reasonably warrant,"—is law at this day: but the question still is, whether there was not in this case reasonably sufficient evidence to warrant the jury in inferring a contract on the defendant's part to be answerable for necessaries supplied to a son whom he had [*455] thrown upon the world in the manner here shown.

Needham, contra, was not called upon by the court.

JERVIS, C. J.—I am of opinion that this rule must be made absolute. It is well settled that a father is not, without some contract express or implied, liable for necessaries supplied to his son. Lord ABINGER, in *Mortimore v. Wright*, says: "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law." To that doctrine I entirely subscribe. If a father turns his son upon the world, the son's

only resource, in the absence of anything to show a contract on the father's part, is, to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty. The simple question, therefore, in this case, is, whether there was any evidence whatever of authority to charge the defendant. The evidence is, that the father starts his son for London in search of a ship, with 5l. in his pocket, and advises him to go to one hotel, and the son goes to another. There really was *no* evidence to go to the jury,—that is, no reasonable evidence which ought to have been submitted to the judgment of the jury.

MAULE, J.—I am of the same opinion. People are very apt to imagine that a son stands in this respect upon the same footing as a wife. But that is not so. If it be asked, is, then, the son to be left *456] to starve,—the answer *is*, he must apply to the parish, and they will compel the father, if of ability, to pay for his son's support. That is the course which the law points out. But the law does not authorize a son to bind his father by his contracts. Upon the evidence in this case, it is clear there was a total absence of authority in the son to contract on the part of the father the debt now sued for. The plaintiff originally contracted with the son, intending to trust to him for payment. There is nothing in the correspondence from which we can infer an intention on the father's part to confer authority upon the son to contract a liability for him. The letter written by the defendant's attorney does not admit, or give any colour of admission of, an original liability. I think there is not even what is called a *scintilla* of evidence. But it is quite clear that there is not such evidence as would justify a jury in finding a verdict for the plaintiff. I therefore agree with my lord, that the rule must be made absolute to enter a nonsuit.

CRESSWELL, J.—I am entirely of the same opinion. The under-sheriff ought to have nonsuited the plaintiff, or told the jury that there was no evidence to warrant them in finding for him.

TALFOURD, J., concurred.

Rule absolute.

In accordance with the law as laid down in this case are *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Pick. 159; *Wood v. Giles*, Coxe, 449; *Angel v. M'Clellan*, 1st Mass. 28; *Gordon v. Potter*, 17 Vermont, 346; *Hunt v. Thompson*, 3 Scammon, 179; *Raymond v. Loyl*, 10 Barbour Sup. Ct. 483.

There is no implied promise on the part of a child, to pay for necessaries furnished to a parent without his request, and the obligation can only be enforced in the mode pointed out by the statute: *Edwards v. Davis*, 16 Johns. 281.

A parent is bound to provide his children with necessaries; and if he neglects to do so, a third person may supply them, and charge the parent with the amount: *Van Valkinburgh v. Watson*, 13 Johns. 480. Where an infant child

escapes from his father for fear of personal violence and abuse, and cannot with safety live with him, the father is liable for necessary support and education furnished to such child by a stranger: *Stanton v. Willson*, 3 Day, 37. In order to charge a parent with supplies furnished to his infant child without his direction, some clear and palpable omission of duty on the part of the parent in not furnishing necessaries, must be shown: *Pidgin v. Cram*, 8 New Hamp. 350. If a father abandon his duty, so that his infant child is forced to leave his house, he is liable for a suitable maintenance; but where the son voluntarily leaves his father's house, the authority of the father to purchase necessaries is not implied: *Owen v. White*, 5 Porter, 435.

***DUNKLEY v. FARRIS.** *June 7.*

[*457]

Where an attorney's clerk had fraudulently simulated the court seal upon a writ of summons, the court set aside the writ and all proceedings thereon, and ordered the attorney (though blameless) personally to pay the costs.

FIELD, in Easter Term, obtained a rule calling upon the plaintiff and Mr. Lewis, his attorney, to show cause why the writ of summons, and the copy and service thereof, and all subsequent proceedings, should not be set aside, and why *the plaintiff's attorney* should not pay the costs of the application. The ground of the motion was, that the writ had been issued without the seal of the court,—that which purported to be the court seal, being nothing more than an impression taken from the seal upon another writ.

The matter having been referred to one of the masters to inquire into the circumstances under which the alleged fraud had been committed, Mr. Ray now reported to the court, that the semblance of a seal had been impressed upon the writ in question by placing it in contact with a seal which had just been put upon another writ; but that this had been done by the clerk, without the knowledge of Mr. Lewis, his employer.

Byles, Serjt., for the plaintiff, admitted that he could not, under these circumstances, resist the rule being made absolute, to set aside the writ and all proceedings thereon; but, he submitted, that, inasmuch as the master had by his report acquitted Mr. Lewis of all blame in the matter, and the act of the clerk in simulating the seal of the court was a *criminal* act, for which, in general, an employer is not responsible, Mr. Lewis ought not to be visited with costs.

*JERVIS, C. J.—There are many acts of a servant for which, though criminal, the master is civilly responsible by action. [*458] The defendant certainly ought not to bear his own costs; still less should the plaintiff, who has had confidence in Lewis, suffer from his want of caution in employing a dishonest clerk. Although, therefore, we acquit Mr. Lewis of participation in the fraud,—which we have reason to suspect to have been of frequent occurrence,—we think he must personally bear the costs.

CRESSWELL, J.—The writ was served by the direction of Mr. Lewis. The defendant was obliged to come to the court to set it aside. Lewis is the only person upon whom we can impose the costs: and, however hard it may be upon him, there is no help for it.

TALFOURD, J.—The service of the writ was an act done in the prosecution of the attorney's duty; it was therefore his act. By making Mr. Lewis pay the costs of setting aside the proceedings, we are not to be understood as imputing any blame to him. But we have no alternative.

Rule absolute accordingly.

*459] *PRITCHARD, Executrix of DANIEL PRITCHARD, deceased, v. BAGSHAW and Two Others.

An abstract and affidavit used by a party upon a reference before the master, to prove title in himself, are admissible evidence against him in a subsequent action, upon the principle laid down in *Slatterie v. Pooley*, 6 M. & W. 664.

The nisi prius record, showing that the writ of summons issued within six years of the accrual of the cause of action, is not conclusive evidence to prevent the operation of the statute of limitations. Whether it is even *prima facie* evidence for that purpose,—*quære*.

Where the writ of summons has been continued by *alias* and *pluries*, in order to prevent the operation of the statute, it is necessary for the plaintiff to show that the endorsement of a memorandum containing the day of the date and *return* (?) of the first writ, required by the 10th section of the 2 W. 4, c. 39, was made upon the *last* writ before the service thereof upon the defendant.

An examined copy of the roll containing such endorsements, is not evidence of the fact: neither is the writ itself.

As to the time when, and the party by whom, the endorsements on the *intermediate* writs must be made—*quære*.

THIS was an action of trover brought by the plaintiff, as executrix of Daniel Pritchard, deceased, to recover the value of a plant used by him as a contractor for public works; the declaration alleging a conversion in his lifetime, to wit, on the 1st of January, 1843.

The defendants pleaded,—first, not guilty,—secondly, not possessed,—thirdly, leave and license,—fourthly, that the cause of action in the declaration mentioned did not accrue at any time within six years next before the commencement of the suit.

The plaintiff joined issue on the first and second pleas, replied *de injuriâ* to the third, and, to the last, that the cause of action did accrue within six years. Issue thereon.

The date of the writ at the commencement of the declaration, was, the 16th of June, 1846.

The cause was tried before TALFOURD, J., at the sittings in Middlesex after last Hilary Term. It appeared that, in 1838, an act of parliament (1 & 2 Vict. c. lxxxvii.) was passed for reclaiming and embanking certain waste lands at Lough Swilly, in Ireland, and for vesting the lands so reclaimed in the undertakers, six individuals named therein, of whom Dimsdale and Robertson were two. In 1840, Daniel Pritchard and one Anderson were employed as contractors to form a portion
*460] of the *embankment. In July, 1841, possession was taken by one Abernethy, the resident engineer of a company which had been formed for carrying the act into effect, of the plant belonging to Pritchard; and, in 1842, Robertson and Dimsdale entered into a contract with another contractor, named M'Cormick, to complete the works, using the plant in question.

For the purpose of showing that Robertson and Dimsdale, in making the contract with M'Cormick, were acting as the agents of the defendants, and so to render the latter responsible for the conversion of the plant, the plaintiff's counsel put in a bill and answer in a suit instituted

by the defendants against one Sir John M'Neil, for a specific performance of a contract relating to the wastes, in which suit there was a decree referring it to the master to take an account of the outlay of money in the drainage thereof. They then tendered an abstract which had been used by the defendants before the master, to show their title to the embankments in question, and which contained, amongst other things, the particulars of a deed bearing date in November, 1840, whereby Robertson and Dimsdale, in whom the waste lands in question had then become vested, had assigned the same to certain persons of whom the defendants were three, as trustees for the company: and also an affidavit used by the now defendants in that suit, and made by Dimsdale, in which he stated that he was the manager of the company at the works.

This evidence was objected to on the part of the defendants; but the learned judge admitted it.

The conversion relied on, was, the taking possession of the plant by Abernethy, in July, 1841. The first writ of summons having issued on the 16th of June, 1846, in order to take the case out of the statute of limitations, it became necessary for the plaintiff to show that that writ had been regularly continued. For this purpose, *an examined copy of the roll was produced, with the continuances duly [*461 entered thereon, as follows:—

“Pleas holden at Westminster, before the Right Honourable Sir NICOLAS CONYNGHAM TINDAL, Knight, and his brethren, &c., and before the Right Honourable Sir THOMAS WILDE, Knight, and his brethren, &c.

“ On the 10th day of November, A. D. 1846.

“ England, to wit. Our lady the Queen issued her writ of summons in these words, to wit, &c. [setting out the writ of summons, dated the 16th of June, 1846]: Afterwards, and within one calendar month next after the expiration of the said writ, including the day of such expiration, to wit, on the said 10th day of November, 1846, comes here the said Anne Pritchard, surviving executrix as aforesaid, by R. S. P. and T. N., her attorneys, and offers herself against the said John Bagshawe [and five others], in the action aforesaid; and the said R. S. P. and T. N. now here return that the said John Bagshawe, &c., are not found in, &c., or within two hundred yards, &c.; and the said John Bagshawe, &c., do not come, and have not appeared to the said action, according to the exigency of the said writ: And hereupon the said Anne Pritchard, by her attorneys aforesaid, prays another writ, &c., in continuation, &c., and it is granted to her, &c.

“ And hereupon, within one calendar month next after the expiration of such first-mentioned writ, including the day of such expiration, to wit, on the 10th day of November, 1846, our said lady the Queen issued her other writ of summons, in continuation of the said first writ, in

these words, to wit, &c. [setting out the *alias* writ]; and which said last-mentioned writ *contains* a memorandum endorsed thereon, specifying the day of the date of the said first-mentioned writ, and the said return thereto."

*462] *The roll then set out six *pluries* writs, the last of which bore date the 14th of April, 1849, and alleged, after the statement of each, as above, "and which said last-mentioned writ *contains* a memorandum endorsed thereon, specifying the day of the date of the said first-mentioned writ, and the said return thereto."

This being objected to, on the ground that it did not show that the endorsements required by the 2 W. 4, c. 39, s. 10, to be made on the *alias* and *pluries* writs, had been duly made, the plaintiff's counsel put in the writs themselves, all of which, except the last, were endorsed with the date of the first writ, and of its return of *non est inventus*.

It was thereupon objected, on the part of the defendants, that, inasmuch as there was no evidence to show *when*, or *by whom*, the endorsements were made, the issue was not proved,—the 10th section of the statute requiring that the writs shall be endorsed *at the time of service*, and, in the case of non-bailable process, *by the plaintiff or his attorney*.

The learned judge was of opinion that the issue on the statute of limitations was sufficiently proved by the production of the nisi prius record; and a verdict was found for the plaintiff, damages 1971*l*.

Phipson, in Easter Term last, moved for a new trial, on the ground of the improper reception of evidence, and of misdirection.—1. Dimsdale's affidavit, having been used by the defendants in the Chancery suit, was no doubt admissible evidence against them upon this occasion: but the abstract stands upon a totally different footing. It only purports to be a recital of or extracts from certain deeds, and does not fall within the principle upon which the acts and admissions of parties have *463] been held to be admissible in evidence against them: *Brickell v. Hulse*, 7 Ad. & E. 454 (E. C. L. R. vol. 34), 2 N. & P. 426; *Gardner v. Moulton*, 10 Ad. & E. 464 (E. C. L. R. vol. 37), 2 P. & D. 403; *Slatterie v. Pooley*, 6 M. & W. 664.† [JERVIS, C. J.—Suppose the defendants had produced the deeds, would they not have been evidence? Why should not an abstract also be evidence? It would be a dangerous principle to lay down that a statement made by a party is not evidence against him, because it is not quite full.] If this be good evidence, every admission of a copy will be an admission of the original, even upon a different occasion, and with reference to a different inquiry.

2. The 10th section of the 2 W. 4, c. 39, enacts "that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may

not have been arrested thereon or served therewith: Provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum endorsed thereon, or subscribed thereto, specifying the day of the date of the first writ; and return to be made, in bailable *pro- [*464] cess, by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and, in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be." In *Walker v. Collick*, 4 Exch. 171,† it was distinctly held, that, in order to save the statute of limitations, a second or subsequent writ of summons must, at the time a copy is served, contain the endorsement required by the 2 W. 4, c. 39, s. 10; that such endorsement must have been made by the plaintiff or his attorney; and that the roll is no evidence of these facts. And in *Medlicott v. Hunter*, 5 Exch. 34,† the Court of Exchequer refused to amend the endorsement on a *pluries* writ of summons, by making the day of the date of the first writ conformable to the fact,—“because, by the terms of the statute, the endorsement must be on the writ at the time of service.” The plaintiff was bound to show that he had literally and truly complied with the statute.

PER CURIAM.—The rule may go on the last point, but not upon the first. It seems to be conceded that this ought to be the result, unless some distinction can be made in the application of the rule in *Slatterie v. Pooley* to the abstract and to the affidavit. In substance we see none. This is not so strong a case as that.

A rule nisi having been granted accordingly,

Channell, Serjt., and *Hugh Hill*, showed cause.—The examined copy of the roll which was put in, showed that the first writ was issued and returned in time by the plaintiff's attorney, and also that the second and subsequent writs were duly issued, returned, and filed. In addition to this, the proper officer produced, from the proper custody, the original and all the intervening writs,—each of these writs bearing the required *endorsement. According to the practice of the court, [*465] the officer, whose duty it is to receive and file the return, makes an endorsement of the day and hour when the writ is presented to him; and, if it be not within time, he refuses to receive it without a judge's order. Each of these writs, therefore, shows upon the face of it that

the returns were made at the proper times, and by the plaintiff's attorneys; for, they cannot be altered after the writ has been once received and the return filed by the proper officer. There is, therefore, no ground for the objection. [*Phipson*.—The objection is, that the plaintiff failed to prove that the endorsement on the *last* writ, of the day of the date and return of the *first* writ, was upon such *last* writ at the time of service, and was made by the plaintiff's attorneys. WILLIAMS, J.—It might have been served without any endorsement; and the endorsement might have been put upon it afterwards, and by a stranger, before it was produced.] *Walker v. Collick* differs materially from the case now before the court; and there are authorities to which the attention of the Court of Exchequer was not called. In that case, the defendant produced a copy of the *alias* writ of summons, which had been served upon him, and which did not contain the memorandum of the day of the date of first writ and return, as required by the statute. It was no very violent presumption, as against the plaintiff, to assume that to be a true copy. Here, there was no such proof. In answer to that evidence, all that the plaintiffs produced, was, an examined copy of the roll, which contained an entry of the day of the date, and the return, of the first writ. Here, we did more; we put in the original writs. If the plaintiff in *Walker v. Collick* *had* produced the original writ, properly endorsed, the defendant might fairly, under the circumstances, have called upon him to show when the endorsement was made. [CRESSWELL, J.—The *466] defendant took the burthen *of proof upon himself: but upon whom did it really lie?] Upon the plaintiff, no doubt. In *Harper v. Phillips*, 7 M. & G. 397 (E. C. L. R. vol. 49), 8 Scott, N. R. 115, the issue, as set out in a writ of trial, stated the suing out of a former writ of summons, to meet a plea of the statute of limitations: the plaintiff having obtained a verdict, upon an issue taken on the accrual of the cause of action within six years, the court refused to grant a new trial, upon an affidavit that no such writ had ever been returned, and that no continuances had been entered on the roll, and that the issue *delivered* contained no notice of a former writ. That case was not cited in the Court of Exchequer. [JERVIS, C. J.—The presumption you seek to rely upon is cut from under you by your own evidence. There is some confusion in the language used in the latter part of the clause,—“*and* return to be made,” &c. If the expression had been, as Lord DENMAN, in *Hunter v. Caldwell*, 10 Q. B. 69, 79 (E. C. L. R. vol. 59), suggests it should have been, “*such* return to be made,” &c., a good deal of the difficulty would have been obviated. It *was* “*such*” in the bill; but it got altered somehow in its progress through parliament; and it is “*and*” upon the roll.(a)] The words “to be made” have reference to

(a) In the *bill*, as originally introduced in the Lords, and as printed after the amendments in committee, the word was “*such*.” In the bill which was printed for the Commons, and sent back to the Lords without amendment, the word “*and*” is found; and so it stands on the parliament-roll. The alteration was evidently made in the engrossment of the *bill* in the Lords, before

the return, and not to the endorsement. The statute provides for three things,—first, what shall be done with the first writ,—secondly, what shall be done with the second and *subsequent writs,—thirdly, by [*467] whom the return shall be made. The plaintiff was entitled to rely upon the nisi prius record. [TALFOURD, J.—That was my impression at the trial. WILLIAMS, J.—I certainly should have thought that the judge at nisi prius was bound by the date appearing on the nisi prius record; and that it was for the defendant, if that were wrong, to come to the court to set aside the trial.] If the plaintiff be at liberty to rely upon the record, the advantage he obtains therefrom is not taken away by any other evidence. [CRESSWELL, J.—In *Pratt v. Hawkins*, 15 M. & W. 399,† the court seem to have considered the roll evidence. JERVIS, C. J., referred to *Williams v. Williams*, 10 M. & W. 174, 476,† where endorsements were allowed to be amended.] In *Medlicott v. Hunter*, 5 Exch. 34,† the application was, to amend *after service*. The writ itself being produced here, the court will not presume, in favour of this technical objection, that the endorsement was made at an improper time. [JERVIS, C. J., referred to *Higgs v. Mortimer*, 1 Exch. 711.†]

Phipson, in support of his rule.—The burthen lay on the plaintiff to show that the action was commenced within six years. The endorsements on the first and intermediate writs may be made at any time during their currency; but the endorsement on the last writ must at all events be on it at the time of service, and must, in the case of non-bailable process, be made by the plaintiff or his attorney. The plaintiff must show that the statute has been duly and strictly complied with in this respect. It is important to the defendant to know when the action was commenced. *Pratt v. Hawkins* and *Higgs v. Mortimer* show that the first writ is the commencement of the action, if the defendant has been served therewith, or the writ has been properly continued. The nisi *prius record may be conclusive evidence of the issuing of the first writ; but it is no evidence at all that the writ has been duly [*468] continued. In *Mann v. Williams*, 15 Law Times, 250, where it was held, that, upon a plea of the statute of limitations, the plaintiff cannot avail himself of a writ issued within the six years, unless service of it within the six years, or regular continuances, be proved,—the nisi prius record was held not to be conclusive. [CRESSWELL, J.—That is a somewhat apocryphal report.] Then, is the examined copy of the roll evidence of the time at which the endorsements were made? It is submitted that it is not. There is nothing in the statute to show that the endorsement on the writ is to form part of the roll. [JERVIS, C. J.—The endorsement is no part of the writ.] The court will not presume that the endorsements on the intermediate writs were made during their transmission to the Commons. It may not be out of place here to observe, that what was formerly known as the “parliamentary roll” has ceased to exist. Instead of the old engrossment, the roll now (from 1849) consists of a printed impression on vellum, of the “foolscap” edition of the statutes usually sent to magistrates and other official persons.

currency. The language of this roll,—which adopts the form given in Chitty's Forms, 6th edit. p. 527,—would seem to import time present, the words being “which said last-mentioned writ *contains* a memorandum,” &c.; whereas, the form given by Mr. Tidd,^(a) says, “which said last-mentioned writ *did contain* a memorandum,” &c. In *Williams v. Williams*, 10 M. & W. 174,† the Court of Exchequer held that the endorsement on a second or subsequent writ of summons, issued to save the statute of limitations, must contain a memorandum specifying the date, not only of the first writ, but of the return thereto. [JERVIS, C. J.—You cannot put that case higher than this,—that Lord ABINGER, and ALDERSON, B., favoured the argument I urged: it was not a *decision*, though it has ever since been treated so.] It was acted upon in *Walker v. Collick*. ALDERSON, B., there says, during the argument,—“Assum-
*469] ing the whole *of the record to be true, it does not prove that the requisites of the statute have been complied with.” [JERVIS, C. J.—In the case of bailable process, the endorsement of the return is to be made by the sheriff. Suppose he will not do so, what is the remedy? You cannot rule him: are you to have an action against him? CRESSWELL, J.—To call upon the sheriff to endorse the date of the first writ, is to call upon him to record a matter of which he knows nothing.] He knows how he returned the first writ; and that is all he is called upon to record. [WILLIAMS, J.—I can understand why the statute requires the date of the *first writ*, and not that of the intermediate ones, to be endorsed on the last writ: but I cannot understand why the date of the *return* of *that* writ should be required, more than of the subsequent writs.^(b) How is the sheriff to know, when a later writ is delivered to him, the date of the return of the first writ?] By inquiry.

JERVIS, C. J., now delivered the judgment of the court.—The court took time to consider in this case, in order that they might look more closely into the statute 2 W. 4, c. 39, s. 10, the language of which is somewhat confused, and into the authorities, which seemed to be conflicting. The action was trover; and the defendants pleaded the statute of limitations. In order to prove the issue, which lay on her, the plaintiff produced the roll, on which the several writs, with the endorsements of their dates and returns thereon, in compliance with the 10th section. The writs themselves were also produced, all endorsed with the date of the first writ, and of its return of *non est inventus*, except the last. It was contended, on behalf of the defendants, at the trial,
*470] that this *did not prove the issue: to which it was answered, that the presumption was that all had been regularly done; and that, if not, the date of the writ must be taken to be that on the record. My brother TALFOURD thought that the plaintiff had estab-

(a) Tidd's Forms, 8th edit. pp. 30, 31.

(b) This assumes the proper reading of the clause to be, “specifying the day of the date of the first writ and return; each return to be made,” &c.

lished the issue in the affirmative, and accordingly she had a verdict. Upon the argument of the rule, it was contended that this was a misdirection; that the plaintiff ought to have shown by evidence that the endorsement of the date of the first writ was made upon the last writ at the time when such last writ was served; and that the endorsement must be proved to have been made by the attorney or party,—this being the case of non-bailable process. The view taken by the court renders it unnecessary to decide some of the points made upon the argument. With regard to the first point urged in answer to the rule,—that the court is bound to take the date of the writ to be as stated on the record,—that is answered by the evidence itself, which showed that the first writ had not been served, but had been returned *non est inventus*. That writ, therefore, *prima facie*, would not be available to prevent the operation of the statute of limitations; but it would be available, if, as required by the 10th section of the 2 W. 4, c. 39, such writ, and every writ issued in continuation thereof, had been returned *non est inventus*, and entered of record within a month, and if every writ issued in continuation of the preceding writ had been issued one month after the expiration of the preceding writ, and had contained a memorandum endorsed thereon or subscribed thereto, specifying the day of the date of the first writ, and if ultimately a writ so endorsed was served upon the defendants.

Now, it was not objected that the endorsements on the intermediate writs were not proved to have been properly made; but it was insisted that the endorsement on the last writ must be made, by the plaintiff or his attorney, before the service thereof, and that that fact must be *proved. That the writ must be endorsed before service, is clearly established by the case of *Medlicott v. Hunter*, 5 Exch. [*471 34,† in which the point came directly before the court. We are authorized and bound by that decision, as well as by the statute itself, to hold such to be the rule of law. If so, was it proved at the trial that that endorsement was made before service? It has been insisted that the production of the roll shows that it was. But that is not so. The roll says that the writ *contains* the endorsement; that is, that it contained it at the time of enrolment: but this does not prove that the writ contained the endorsement *at the time of service*: on the contrary, it was expressly determined in *Walker v. Collick*, 4 Exch. 171,† that the roll, containing this very entry, was not available to establish that fact. If, then, the fact of endorsement at the time of service is not proved by the production of the roll, is it proved by the production of the writ itself? The writ is produced many months after the date of the service. It is plain, therefore, that the mere production of it from the hand of a party who might have made the endorsement upon it at any time after service, cannot be evidence that the endorsement existed at the time of service. We therefore think there was no evidence to show

that the endorsement on the last writ was made at the time of service. consequently, we are not called upon to determine whether or not the endorsement should have been made by the attorney or the party. Nor need we consider at what time the endorsements on the intermediate writs should have been made. The absence of proof of the endorsement on the last writ having been made thereon at the time of service, entitles the defendants to have the rule made absolute for a new trial.

Rule absolute accordingly.(a)

(a) The action was compromised.

*472] *Sir JOHN HARE, Knight, v. FLEAY. June 2.

An order, under the 1 & 2 Vict. c. 110, s. 18, for payment of money pursuant to an award,—upon a reference by judge's order of a cause and all matters in difference between the parties,—may be granted before the time for moving to set aside the award has expired; the motion in that case being in the nature of a writ of error, and not of a motion in arrest of judgment. The award directed the defendant to pay a certain sum "to the plaintiff, or to Mr. S., his attorney:"—Held, that a demand by S. was sufficient to found a motion for an attachment, or a motion under the 1 & 2 Vict. c. 110, s. 18.

THIS was a reference, under an order of WILLIAMS, J., dated the 22d of November last, of all matters in difference in the cause between the parties, to a barrister,—the costs of the cause, and of the reference and award, to abide the event of the award.

The arbitrator, on the 14th of January, 1851, made his award, as follows:—"I find and award for the plaintiff on all the issues: I find and award, that, at the time of the commencement of the said suit, the defendant was indebted to the plaintiff, and that the plaintiff had good cause of action against the defendant, in respect of the several matters in the declaration mentioned, to the amount of 100*l.*, and no more: And I award and direct that the defendant pay to the plaintiff, or to Mr. D. Serrell, his attorney, the said sum of 100*l.*, and 1*s.* which I award to the plaintiff as damages for the detention thereof, at the office of the said Mr. Serrell, in Gray's Inn, on Saturday, the 1st of February next, at the hour of 11 o'clock in the forenoon of that day."

The order of reference was afterwards made a rule of court, and the costs taxed and allowed at 97*l.* 16*s.*

Lush, in Easter Term last, obtained a rule calling upon the defendant to show cause why he should not forthwith pay to the plaintiff or his attorney the several sums of 100*l.*, 1*s.*, and 97*l.* 16*s.*, pursuant to the award, *allocatur*, and rule of court. The affidavit of demand was made by Mr. Serrell, and stated "that he did, on the 11th of March last, personally serve the defendant with a true copy of the award, and of the rule, and of the master's *allocatur* thereon, and at the same time showed to the defendant the said original award, and the said rule

*and *allocatur* thereon; and that the deponent then demanded of the defendant the several sums of 100*l.*, and 1*s.*, in the said [*472 award mentioned, and also the sum of 97*l.* 16*s.*, the costs allowed by the master upon the said rule; and that the defendant, in answer to such demands so made by this deponent, said that he could not pay; and this deponent further saith, that the defendant did not then, nor hath he at any time, paid to this deponent the said several sums of 100*l.*, 1*s.*, and 97*l.* 16*s.*, or any or either of those sums, or any part thereof: And this deponent further saith that he verily believes that the said three several sums have not, nor have nor hath any or either of them, or any part thereof, been paid to the plaintiff, or to any one for or on account of the plaintiff, and that the same still remain wholly due and unpaid."

Bramwell and *J. Thompson* showed cause.—1. This rule was moved too soon. The award was made on the 14th of January last; consequently, the defendant had the whole of Easter Term in which to move to set it aside: 2 Archb. Pr., by Chitty, 8th edit., p. 1503; Russell on Arbitration, 623. The demand, therefore, which was made on the 11th of March, was one which the defendant was justified in resisting. In *Jones v. Ives*, 10 C. B. 429 (E. C. L. R. vol. 70), a cause and all matters in difference between the parties were referred by an order of nisi prius, by which a verdict was taken for the plaintiff, subject to an award,—the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator by his award ordered that the verdict entered for the plaintiff should stand, and directed that the defendant should pay to the plaintiff the costs of the reference and award. And it was held that the plaintiff was not entitled to have an *allocatur* for the costs, or to sign *judgment, [*474 until the expiration of the proper time for moving to set aside the award. So, in *Hobdell v. Miller*, 2 Scott, N. R. 163, the court intimated an opinion, that a party entitled to costs under an award, cannot proceed to the taxation of such costs until the time for moving to set aside the award has elapsed. 2. The application is not one which is authorized by the act of parliament 1 & 2 Vict. c. 110, s. 18. The practice of granting these orders originated in the case of *Jones v. Williams*, 8 M. & W. 349;† and that precedent has been followed in *Doe v. Amey*, 8 M. & W. 565,† and in several subsequent cases: but it has been the subject of very grave doubts. [MAULE, J.—I entertain great doubt whether the statute was intended to apply to such cases. JERVIS, C. J.—I think it is quite clear that the statute never intended to apply to orders other than those which the courts were before in the habit of making. But so many cases have occurred in all the courts, that it must now be considered the established practice to make them: MAULE, J.—The essence of authority is, established practice; and this must now be deemed an inveterately established practice.] The rule

will have all the effect of a judgment; and the court will only grant it where the party seeking it has complied with all that would be held requisite upon a motion for an attachment: *Creswick v. Harrison*, 10 C. B. 441 (E. C. L. R. vol. 70), 1 L. M. & P. 721; *Tattersall v. Parkinson*, 2 Exch. 342.† Here, the demand having been made twenty-five days before the rule was moved, and made by the attorney, and not by the party himself, it cannot be said that there has been such a default as to warrant the court in holding the defendant to be guilty of a contempt. The demand should be made by the plaintiff, or under a power of attorney; *Tidd's Practice*, 9th edit. p. 836; except in the case of costs, *475] where, the costs being in some sense the attorney's, *the demand may be made by him: *Archb. Pr. by Chitty*, 8th edit. p. 1518.

3. The award is bad for directing the money to be paid to the plaintiff, or to Mr. Serrell, his attorney: it would, if good, constitute Mr. Serrell for this purpose the irrevocable attorney of the plaintiff. [JERVIS, C. J.—The award is in the form which is to be found in *Tidd's Forms*, 8th edit. p. 306. [MAULE, J.—The award assumes Serrell to be the attorney in the suit, and directs the payment to be made to the plaintiff, or to Mr. Serrell, his attorney,—that is, so long as a payment to him would be a payment to the plaintiff.] This application calls upon the defendant to pay to the plaintiff or to his attorney. If the order is made, who would be entitled to issue execution? [MAULE, J.—The plaintiff, of course.]

Lush, in support of the rule.—The award is according to precedent; the object being to save the inconvenience and expense of a power of attorney. A demand by Serrell was clearly sufficient. In *Corbett d. Clymer v. Nicholls*, 2 L. M. & P. 87, where a rule of court ordered possession of lands to be restored to A., B., and C., or to D., their tenant, a demand by A. alone, without any special authority from B. and C., was held sufficient. In opposition to the rule in that case, *Manwell v. Thompson*, 6 D. & L. 91, where an application was made for an attachment against the plaintiff for non-payment of costs pursuant to the master's *allocatur*; but, the affidavit which denied the payment being made by some only of the defendants, the court refused it, as it was consistent with the affidavit, that the costs might have been paid to those who had not joined in the affidavit,—being cited, MAULE, J., said: "There the court took the objection. The application was for an attachment absolute in the first instance; and, as the person against whom it *476] was made had no *opportunity of opposing it, the court took upon itself to exercise all its astuteness in scrutinizing the affidavits. Here, however, the application was only for a rule to show cause; and we thought that the affidavit showed enough to call on you to show cause. You are now doing so; and, if you did deliver up possession, as you suggest, you should have said so." Here, it is sworn that the money was not paid on the 15th of April: if it has been paid since, the defendant

might have said so. [JERVIS, C. J.—The only point upon which we wish to hear you, is, whether the application is not premature,—whether the motion should not have been delayed until after the expiration of the time allowed for moving to set aside the award.] That an application of this sort may be made before the expiration of the time for moving to set aside the award, is clear from *Doe v. Amey*, which was not cited in *Jones v. Ives*. ALDERSON, B., there says: (a) “The party against whom it (the order) is made will not be prejudiced; for, he has the same right as before to move the court to set aside the award; and, if he succeed in that application, every thing that has been done under it must fall to the ground; the rule and order would then be set aside, and execution under it would be set aside also, and the money levied would be restored to the defendant.” This, however, is merely a reference of *the cause*; consequently the statute of 9 & 10 W. 3, c. 15, does not apply. (b) [MAULE, J.—Assume that this is not within the statute; still the court has some power of interfering with the award.] Where the arbitrator is merely put in the place of a jury, the party has only the four days to move, as in cases of arrest of judgment. [JERVIS, C. J.—That is where the reference is by order of nisi prius. There may be no issues here.] The arbitrator finds issues. [MAULE, J.—He does not *order a *verdict* to be entered. Could the court give judgment?] [*477] No. [MAULE, J.—Then there is no such limitation as you suggest. JERVIS, C. J.—Upon looking at *Jones v. Ives*, I find it has no bearing upon this case. The motion was, to compel the master to give out the *allocatur*.] The result of the court’s granting that application would have been that the plaintiff might have signed judgment and issued execution, and the defendant would have had no opportunity to object to the sufficiency of the award. Here, the defendant might have shown the badness of the award for cause against this rule. [JERVIS, C. J.—There is some confusion in the cases of *Little v. Newton*, 2 Scott, N. R. 159, and *Hobdell v. Miller*, 2 Scott, N. R. 163: but, upon looking at the terms of reference, the two cases are reconcileable. In *Hobdell v. Miller*, the arbitrator awarded a verdict, and the plaintiff sought to have his costs taxed before the first day of the term after the making of the award.]

JERVIS, C. J.—I am of opinion that this rule should be made absolute. The only point upon which the court entertained any doubt, was, whether the motion for an order upon the defendant to pay the money mentioned in the award, could properly be made before the time for moving to set aside the award had expired. Without the aid of any authority, I should have inclined to think it could. The defendant having been guilty of a breach of duty in not paying, on demand duly made, the sum which he was ordered by the award to pay on the 1st of

(a) 8 M. & W. 570.†

(b) See the authorities collected in 2 Chitt. Archb. 8th edit. p. 1503.

February, there is no reason why further time should be given to him. In showing cause against the rule, he might have availed himself of any defect apparent on the face of the award. It was supposed that *Jones v. Ives* was an authority adverse to this application. Upon examination, *478] however, I think *it is not so. That was a reference of a cause and all matters in difference, by an order of nisi prius, by which a verdict was taken for the plaintiff, subject to an award; and the application was, that the master should be directed to grant his *allocatur* for the costs, to enable the plaintiff to sign judgment. If it had been a reference of *the cause* only, the plaintiff might have had his costs taxed, and signed judgment, after the first four days of the ensuing term: but, the reference embracing all matters in difference, the plaintiff was not entitled to sign judgment until after the time for moving to set aside the award had expired, viz. the end of the term. That case is governed by the rule applicable to verdicts, which does not apply here. We cannot now conflict with the rule of practice which has been acknowledged ever since the case of *Doe v. Amey*; which is also an authority for granting such a rule before the expiration of the time for moving to set aside the award. This award directs the money to be paid “to the plaintiff, or to Mr. Serrell, his attorney.” That appears to me to be a very convenient form, and saves the necessity of going through the useless ceremony of a demand under a power of attorney. The demand here was properly made by the attorney: and the order will be to pay the money to the plaintiff, on that demand. There could be no judgment in the name of the attorney.

MAULE, J.—This award pursues a very usual and convenient form: and it would be wrong to hold a power of attorney to be necessary, seeing that it is not required either by the convenience of the parties or by any rule of practice. As to the point which has been mainly relied on, viz. whether, assuming that such a rule as this may well be granted, it may be moved for before the expiration of the time for moving to set aside the award, or whether the plaintiff must wait until that *479] time has *elapsed,—it is a point of some importance. The cases upon the subject are, I think, not irreconcilable. There are some motions as to awards which are strictly what are called motions in arrest of judgment; others, that are more in the nature of writs of error. Where a motion is in arrest of judgment, it must be made within the first four days of the term, or before the return of the jury process. Until that time has elapsed, the successful party is not entitled to judgment at all: he has only an inchoate right,—the complete and perfect right not accruing until after the time for moving to impeach the award has expired. Therefore it may very properly be said, that, until that period, the award is incapable of being enforced through the means of the statute: the very expression “arrest of judgment” supposes something which is to precede the judgment. But, with respect

to motions in the nature of writs of error, it cannot be said that the successful party is not entitled to judgment until after the expiration of the time limited by the practice of the court for bringing a writ of error. When you say that a party is entitled to judgment, you mean entitled to judgment in the court in which the action is originally brought: the possibility of that judgment being reversed in a court of error, is not to be taken into account; if it were, no man could be said to have a perfect judgment until he has obtained a decision of the court of ultimate appeal, or the lapse of the time for resorting to that remedy. This, I think, explains an expression reported to have fallen from me in *Hobdell v. Miller*, 2 Scott, N. R. 165,—“How can the plaintiff have costs taxed before it is certain he can sustain the award?”—before it is certain that he will be entitled to judgment? That would be so, in cases where the award is subject to a motion in the nature of a *motion in arrest of judgment; in which case, the party who has obtained the award may never be entitled to costs at all. But it [*480 is otherwise in cases where the application to set aside the award is in the nature of an appeal by writ of error; for, in that case, the successful party already has a judgment of the court upon which his costs may be taxed, notwithstanding the award may afterwards be successfully impeached. Where the motion is made simply under the 2d section of the 9 & 10 W. 3, c. 15, and is a motion to set aside the award on the ground of misconduct in the arbitrator, it must be made within a certain time, viz. before the last day of the term next after the making of the award. But that statute assumes that there must be a power of enforcing the award before that time has elapsed, though there exists also the power of moving to set it aside; for, section 2 gives the court power in certain cases to “set aside” the umpirage, and enacts that it shall be judged and esteemed “void and of none effect.” I therefore think, that, where an award is sought to be set aside, or is capable of being set aside, only by a motion under section 2 of the 9 & 10 W. 3, c. 15, or by an analogous motion, where parties have agreed to refer a pending suit by order of nisi prius, the motion being in the nature of error, and not of arrest of judgment, there may properly be a motion for an attachment to enforce the award,—and consequently a motion for a rule under the statute 1 & 2 Vict. c. 110, s. 18,—notwithstanding the time for moving to set aside the award may not have elapsed. I therefore agree with the lord chief justice in thinking that this motion was not prematurely made, and that the rule must be made absolute.

CRESSWELL, J., and TALFOURD, J., concurred.

Rule absolute.

*481]

*SOUTHALL v. RIGG.

FORMAN v. WRIGHT. May 13.

To a count on a promissory note, the defendant pleaded that the note was given without consideration, and then went on to allege that it was obtained from him by the plaintiff upon a representation that he the defendant was indebted to the plaintiff in the sum mentioned in the note, whereas in truth and in fact no such sum of money, or any part thereof, was ever due from the defendant to the plaintiff:—Held, sufficient, without alleging that the representation was made *fraudulently*.

To a count upon a promissory note, the defendant pleaded “that he was indebted to one F. in the sum of 10*l.* 14*s.* 11*d.*, and no more; that the plaintiff *fraudulently, deceitfully, and falsely* represented to the defendant that there was due from the defendant to F. the sum of 32*l.* 6*s.* 10*d.*, and then demanded of, and by means of *such representation as aforesaid*, induced the defendant to deliver to him the note in the count mentioned.” It was proved, and found by the jury, that the note was obtained by a *false* representation by the plaintiff that 32*l.* 6*s.* 10*d.* was due, but that such representation had been made *without fraud*:—Held, that the evidence sustained the plea; for, that the words “*fraudulently and deceitfully*” might be rejected, and that the plea was in substance a plea of partial failure of consideration.

THE former of these cases was an action of assumpsit upon a promissory note of 50*l.* made by the defendant on the 19th of March, 1850, payable on demand to the plaintiff or order.

The defendant pleaded,—first, that there never was at any time existing any value or consideration whatever for the making, delivery, or payment by the defendant to the plaintiff of the said promissory note, or for the payment of the said sum, or any part thereof, and that the defendant made and delivered the same note to the plaintiff,—without there having been, and with this that there never was, any value or consideration whatever existing for the making, delivery, or payment by the defendant of the said promissory note, to wit, *for the accommodation of the plaintiff*; verification. Secondly, fraud and covin of the plaintiff and others.

To each of these pleas the plaintiff replied *de injuriâ*; but the second plea was ultimately abandoned.

The cause was tried before TALFOURD, J., at the sittings in London in Hilary Term last. The facts which appeared in evidence were as follows:—The defendant, who with his brothers (all of whom were infants), was entitled to a share of the dividends arising from a small
*482] fund bequeathed to them under a will which had been *the subject of a suit in Chancery, was, in the year 1844 (he being then fourteen years of age), at his own desire, and with the consent of his guardian, a lady named Newman, and with the approbation of the master in Chancery, apprenticed to the plaintiff, for the purpose of learning the trade of a water-gilder; and it was by the indenture agreed that a premium of 50*l.* should be paid by Mrs. Newman to the plaintiff, and that the defendant's share of the dividends should also be paid over to the plaintiff, the plaintiff on his part undertaking to instruct the defendant in his business, and to provide him with proper food,

lodging, &c. At the time the indenture was executed, it was represented by Mrs. Newman to the plaintiff, that the defendant's share of the dividends would amount to 34*l.* per annum, but that, in case they fell short of that sum, the difference would be made up to him on the defendant's attaining his majority.

The dividends accruing to the defendant during the term of his apprenticeship, were duly handed over to the plaintiff, but the amount fell short of 34*l.* per annum,—the deficiency at the end of the term, the 24th of February, 1850, being 77*l.*

On the 16th of March, 1850, the defendant, who had then attained his majority, being told by one Fisher, the clerk to the solicitor in the chancery suit, in the presence of the defendant, that he was bound to make good the 77*l.*, consented to give him a promissory note for that sum, payable on demand; but, being informed three days afterwards that he was not liable, he went to the plaintiff, when, after some discussion, the plaintiff gave up the note for 77*l.* upon the defendant's giving him another note for 50*l.*,—the note which was the subject of this action.

On the part of the plaintiff it was insisted that this evidence did not sustain the first plea, for, that the defendant, in order to prove the particular want of *consideration therein alleged, was bound to show that the note was given *for the accommodation of the plaintiff*. [*483]

The defendant's counsel thereupon obtained leave to amend the plea, by striking out the words "for the accommodation of the plaintiff," and inserting the following,—“for that the same was obtained from the defendant by the plaintiff upon a representation heretofore, to wit, on the day and year last aforesaid, made by the plaintiff to the defendant, that there was then due and owing from the defendant to the plaintiff a large sum of money, to wit, the sum in the said note specified, as and for the deficiency in the amount of certain dividends payable to the plaintiff under and by virtue of a certain indenture of apprenticeship, heretofore, to wit, on, &c., made between the plaintiff and the defendant; whereas, in truth and in fact, no such sum of money, or any part thereof, was ever due and owing by the defendant to the plaintiff as aforesaid or otherwise.”

The learned judge thereupon directed a verdict to be entered for the plaintiff, reserving to the defendant leave to move to enter a verdict for him, if the court should be of opinion,—drawing such inferences of fact as a jury might have drawn,—that the evidence supported the plea as amended.

Butt, in Hilary Term, obtained a rule nisi accordingly.

Byles, Serjt., and *J. Brown*, showed cause.—The plea as it originally stood was clearly bad for not alleging all the circumstances which showed the absence of consideration for the giving of the note: *Atkinson v.*

Davies, 11 M. & W. 236.† The first note was given for a sufficient consideration; for, when the defendant was apprenticed, Mrs. Newman undertook, that, in case the defendant's share of the dividends should *484] fall short of 34*l.* per annum, the amount *should be made up to the plaintiff when the defendant came of age; and that, upon the authorities, was an ample consideration. In *Cook v. Long*, 1 C. & M. 510,† the defendant's father owed the plaintiff money for goods sold, and for the price of these goods the defendant made his promissory note in his own name, and gave it to the plaintiff, who was cognisant of all the facts, and that the defendant had received no consideration for the note: and it was held that the above circumstances could not be given in evidence under a plea of "accommodation bill," and that there was an original liability on the part of the defendant, and that for a good consideration, viz., family affection. So, in *Baker v. Walker*, 14 M. & W. 465,† to an action against the maker of a promissory note payable three months after date, the defendant pleaded that the promissory note was made and delivered by him to the plaintiff for and on account of a judgment debt recovered by the plaintiff against him, and that, except as aforesaid, there never was any consideration or value for the making or delivery of the said note to the plaintiff: and it was held that the plea was bad, inasmuch as it showed that there was an existing debt on account of which the note was made, and the giving of the note was evidence of an agreement by the plaintiff to suspend his remedy upon the judgment, which was a sufficient consideration for the note. And PARKE, B., said: "It is like the case of a note given for a debt of a third party, which has been held to be a sufficient consideration. It was so held in *Poplewell v. Wilson*, 1 Stra. 264, and that principle has been acted upon in many other cases. A promissory note, although not a specialty, resembles a specialty, and at all events it is a security. When a man who has a judgment debt takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and if so, that is a good *485] *consideration for the giving of the note." In *Ex parte Minet*, 14 Ves. 190, it was also held that an undertaking by one person to pay the debt of another, does not require a consideration between them. The liability of Mrs. Newman, therefore, was ample consideration for the giving of the first note. Even if it were doubtful that Mrs. Newman was under any liability in consequence of her promise to the plaintiff, and there was therefore no consideration, or a doubtful consideration, for the first note, the giving up of that note was, upon the principle laid down by the Exchequer Chamber in *Haigh v. Brooks*, 10 Ad. & E. 309, 323 (E. C. L. R. vol. 37), 2 P. & D. 477, 4 P. & D. 288, ample consideration for the second note. [WILLIAMS, J.—In *Byles on Bills*, 6th edit. 111, it is said, that, "if a bill originally given upon an

illegal consideration, be renewed, the renewed bill is also void,(a) unless the amount be reduced by excluding so much of the consideration for the original bill as was illegal.”(b)] In those cases, the instrument was tainted with usury. [JERVIS, C. J.—If your argument be tenable, almost every renewed bill would be clear of the objection of want of consideration.] That is so, if *Haigh v. Brooks* be good law. *Longridge v. Dorville*, 5 B. & Ald. 117 (E. C. L. R. vol. 7), is also an authority to show that the giving up of a doubtful claim is a good consideration for a promise to pay money. The amended plea does not correctly represent the facts proved. In substance, it states that the note declared on was obtained by means of a false representation; whereas, the evidence distinctly negatives any misrepresentation of fact. It shows that this was a voluntary gift of the note, with full knowledge of all the facts. If the note had been paid, could it have been contended for a *moment that the money might have been recovered back? [*486 There would be nothing against conscience in Southall’s retaining it. [JERVIS, C. J.—The note was given by the defendant upon the supposition that he was liable personally to make up the deficiency in the dividends. The two notes form in substance one transaction: the one was a mere substitution for the other; which distinguishes the case from *Haigh v. Brooks*.] If not under a legal obligation, the defendant was at all events under a moral obligation to pay the amount. Besides, the plea as amended would be bad on special demurrer; there was another consideration for the giving of the second note, which is not alleged in the plea, viz. the giving up the former note. There are many cases where it has been held, in affirmance of the maxim, “*Ignorantia facti excusat; ignorantia juris non excusat*,”(c) that, where money is paid in ignorance of the facts out of which the liability of the party paying it is supposed to arise, it may be recovered back; but not where the payment has been made with knowledge of all the facts, but in ignorance of the law: *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt. 143 (E. C. L. R. vol. 1); *Maddock’s Chancery Practice*, 3d edit. p. 96. [CRESSWELL, J.—Do you find any case where a promissory note which has been given in ignorance of the law,—that is, under a mistaken supposition that the person giving it was liable in point of law,—has been enforced as between the immediate parties?] There is no case precisely to that effect. But it is submitted that the authorities above cited are in principle the same.

Butt and Ball, in support of the rule.—The plea as amended sufficiently alleges all the circumstances relied on as showing the absence

(a) Citing *Chapman v. Black*, 2 B. & Ald. 588; *Wynne v. Callander*, 1 Russ. 293; *Preston v. Jackson*, 2 Stark. N. P. C. 237 (E. C. L. R. vol. 3). And see *Hubner v. Richardson*, *Bayley on Bills*, 6th edit. 527.

(b) *Bayley on Bills*, 6th edit. 527.

(c) See *Broom’s Legal Maxims*, 2d edit. pp. 190—193.

*487] of consideration for the note *in question, to satisfy the rule laid down in *Atkinson v. Davies*, 1 M. & W. 236.† In *Bury v. Blogg*, 12 Q. B. 877 (E. C. L. R. vol. 64), it was held, that, where a judge has amended at nisi prius, it is no reason for disallowance of such amendment by the court in banc, that the pleading as amended is specially demurrable, on a ground not pointed out at nisi prius. But it is submitted that this plea is not bad even on special demurrer. Then, the plea as amended was clearly proved. It seems to be conceded that the original note was given without legal consideration, and given under a representation of circumstances which was false in fact. These facts substantially establish the defence set up by the plea: *Shearm v. Burnard*, 10 A. & E. 593 (E. C. L. R. vol. 37). In *Hay v. Ayling*, 20 Law Journ., N. S., Q. B. 171, to an action against the acceptor of a bill of exchange drawn by the plaintiff, the defendant pleaded that a bet was lost by the defendant to A. B., and that the said bill of exchange was, at the request of A. B., given and accepted by the defendant in consideration of the said bet, and to secure the payment thereof, contrary to the statute,^(a) &c., and that there never was any other consideration for the acceptance of the said bill, and that the plaintiff, at the time when he drew and the defendant accepted the same, had notice of the premises. The evidence was, that the defendant had accepted a *prior* bill drawn by the plaintiff, in consideration of a bet lost to A. B., and that the bill sued upon was given in renewal of that prior bill. The jury found that the bill declared upon was given in consideration of the bet, and that the plaintiff had notice of it: and it was held that the plea was proved. [TALFOURD, J.—There is no doubt the parties induced the young man to suppose that the demand was one which Southall could enforce against him.]

*488] *JERVIS, C. J.—Pending the discussion of this case, a rule nisi has been granted in a case of *Forman v. Wright*, which so nearly involves some of the principles upon which this case must be decided, that we think it will be more convenient to reserve our judgment until after the argument of that rule.

Forman v. Wright was an action of debt. The first count was upon a promissory note for 32*l.* 6*s.* 10*d.* made by the defendant on the 7th of November, 1849, payable to the plaintiff or order, on demand. The second count was upon an account stated.

To the first count, the defendant pleaded,—first, a traverse of the making of the note.

Secondly, as to 21*l.* 11*s.* 11*d.*, parcel, &c., that as to that sum, the defendant, before the commencement of the suit, and before the making of the note in the first count mentioned, to wit, on, &c., was indebted to one William Fawcett in a certain sum of money, to wit, the sum of 10*l.* 14*s.* 11*d.*, and no more, for the price and value of goods by the said

^{a)} 5 & 6 W. 4, c. 41.

William Fawcett before then sold and delivered to the defendant, and that the said William Fawcett, to wit, on, &c., died intestate: that, before the making of the said supposed promissory note in the first count mentioned, and before the commencement of the suit, and after the death of the said William Fawcett, to wit, on, &c., letters of administration of the goods and chattels of the said William Fawcett, were duly granted to one Elizabeth Fawcett: that the plaintiff, after the death of the said William Fawcett, and after the granting of the said letters of administration, and before the making of the said note, in the said first count mentioned, and before the commencement of this suit, to wit, on, &c., was duly appointed agent of the administratrix, Elizabeth Fawcett, to act on her behalf in respect of such administration: that the plaintiff, being *such agent as aforesaid, before the making of the said note, and before the commencement of this suit, *fraudulently, de-* [*489 *ceitfully*, and falsely represented to the defendant that there was due from the defendant to the said William Fawcett, before and at the time of his death, and was then, and still remained, due to the administratrix of the said William Fawcett, the sum of 32*l.* 6*s.* 10*d.*; and the plaintiff then demanded of, and, by means of *such representation as aforesaid*, induced and prevailed upon the defendant to make and deliver, and the defendant did then make and deliver to the plaintiff the said note, in the first count mentioned, as and for the payment and discharge of the said sum so alleged to be due as aforesaid, to the said William Fawcett, in his lifetime, and to the said Elizabeth Fawcett, after the death of the said William Fawcett: that, so far as relates to the sum of 21*l.* 11*s.* 11*d.*, parcel of the said sum of 32*l.* 6*s.* 10*d.*, in that count mentioned, there never was any value or consideration whatever for the making and delivery of the said promissory note to the plaintiff: and that the plaintiff then held, and always held, and still holds the same, as far as relates to the sum of 21*l.* 11*s.* 11*d.*, without any value or consideration whatever,—verification.

Thirdly, payment of 10*l.* 14*s.* 11*d.* into court, in satisfaction of the residue;—fourthly, fraud and covin.

The plaintiff replied *de injuriâ* to the second plea, damages *ultrâ* to the third, and joined issue on the fourth plea.

The pleas to the second count became immaterial.

The cause was tried before Lord CAMPBELL, C. J., at the last Spring Assizes at Maidstone. It was proved, and found by the jury, that 10*l.* 14*s.* 11*d.* was all that was due from the defendant to William Fawcett, and that the defendant had been induced to give the note for 32*l.* 6*s.* 10*d.* by the plaintiff's representation that the whole was due; but the jury found that that *representation, though false in fact, was [*490 made under a mistake, and *without fraud*.

On the part of the plaintiff, it was insisted that the essence of the plea was, that the defendant had been misled by a false and *fraudulent*

representation, and consequently that it was not supported by the evidence. For the defendant, it was contended that the allegation that the representation was made *fraudulently and deceitfully*, was immaterial, and that the substance of the plea was, failure of consideration except as to 10*l.* 14*s.* 11*d.*

The learned judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him on the second issue, if the court should be of opinion that the plea was proved.

Montagu Chambers, in Easter Term last, obtained a rule nisi accordingly.—He cited Bayley on Bills, 6th edit. p. 498, Barber v. Backhouse, Peake, N. P. C. 61, 3d edit. 86, and Ledger v. Ewer, Peake, N. P. C. 216, 3d edit. 283.

Bramwell, on a subsequent day, showed cause.—The evidence did not support the plea. The essence of the plea is, that the note was procured from the defendant by a fraudulent and deceitful representation on the part of the plaintiff. The words “fraudulently, deceitfully, and falsely” amount together to an allegation of deceitful falsity; and they cannot be severed. [WILLIAMS, J.—Suppose you strike out all the three words, would not the plea still afford a good defence? Darnell v. Williams, 2 Stark. N. P. C. 166 (E. C. L. R. vol. 3).] The court will not strike out words if by so doing the plea will be rendered bad. If the words imputing fraud be expunged, it will be left *in dubio* whether the note was given in ignorance of the facts or the law. If this had *491] been a money payment, it clearly could not have been *recovered back. [CRESSWELL, J.—Why not?] In Stevens v. Lynch, 12 East, 38, the drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill, in default of the acceptor, three months after it was due, said that *he knew he was liable, and, if the acceptor did not pay it, he would*: and it was held that he was bound by such promise. Bell v. Gardiner, 4 M. & G. 11 (E. C. L. R. vol. 43), 4 Scott, N. R. 621, was the case of a security given in ignorance of the *facts*.

Montagu Chambers and *Horn*, in support of the rule.—This is simply a plea of partial failure of consideration; and the fact relied on to show such failure of consideration, is, that the note was obtained from the defendant upon a mistaken representation of the extent of his liability. The words imputing fraud, deceit, and falsehood, may all be rejected, without in any degree impairing the validity of the plea. There are many cases in which it has been held, that, where money has been paid under a mistake or misrepresentation of fact or law, the party paying it may recover it back. In Bell v. Gardiner, it was expressly held that a negotiable security given by a party in satisfaction of a liability from which he was discharged in law,—in ignorance of the facts which constituted such discharge,—cannot be enforced against

him, though he may have had the *means* of knowing those facts. The same principle has been laid down with respect to adjustments of losses upon policies of insurance: *Hogg v. Gouldney*, Park on Insurance, 8th edit. p. 266; *Rogers v. Maylor*, Ib. 267; *Herbert v. Champion*, 1 Campb. 134.

JERVIS, C. J.—In the case last argued,—*Forman v. *Wright*, [*492—I think the rule must be made absolute. The jury found that the plaintiff, *without fraud*, made a misrepresentation, by which the defendant was induced to give him the promissory note declared on. The plea alleges that the defendant was indebted to one Fawcett in the sum of 10*l.* 14*s.* 11*d.*, and no more; that the plaintiff *fraudulently, deceitfully*, and falsely represented to the defendant that there was due from the defendant to Fawcett the sum of 32*l.* 6*s.* 10*d.*, and then demanded of, and by means of such representation as aforesaid induced the defendant to deliver to him the note in the first count mentioned. The question is, whether the facts so found by the jury support the plea. It is clear that they do not, unless the plea would be good, the words “*fraudulently and deceitfully*” being struck out. If in showing the ground of the alleged partial failure of consideration, it would be enough to state that the note was obtained by any misrepresentation,—whether of law or of fact,—going to the amount of consideration, the plea would clearly be good without those words. Upon consideration, I am of opinion that a plea alleging a failure of consideration, may be supported as well by showing that the bill or note was obtained by a misrepresentation of *law*, as by a misrepresentation of *fact*. A bill or note *primâ facie* imports consideration; and it is not enough in a plea of want of consideration merely to say that the defendant never had any value or consideration; the plea must go on to aver the circumstances which show that there was no consideration. Want of consideration is altogether independent of knowledge either of the facts or the law. I apprehend a man might say, that, in adding up an account, he erroneously supposed himself to be indebted in 100*l.*, whereas in truth 10*l.* only was due: that, in the case of a bill or note, would be a good plea of want of consideration except as to 10*l.* How does that case differ from the present, before the matter has been completed by payment? What the *defendant here, in substance, says, is,— [*493 “I was induced by the plaintiff’s misrepresentation to believe that I was indebted to Fawcett to the extent of 32*l.* 6*s.* 10*d.*, whereas in truth I was indebted only to the extent of 10*l.* 14*s.* 11*d.* I am of opinion that a plea alleging a representation innocently false, of a matter going to the amount of the consideration, is a good plea, though the misrepresentation might be in a matter of law; and that the facts proved and found by the jury in this case sustain the plea, the words “*fraudulently and deceitfully*” being rejected.

The same principle will govern our decision in *Southall v. Rigg*.

That also was an action upon a promissory note. The plea, as it originally stood, stated that there never was any value or consideration for the making, &c., of the note, and that it was made for the accommodation of the plaintiff. It appearing at the trial that the note was not given for the plaintiff's accommodation, but that the defendant had been induced to give it by an incorrect representation made by the plaintiff that the defendant was liable to pay a certain sum, the defendant obtained leave to amend, and the plea was accordingly amended by striking out the words "for the accommodation of the plaintiff," and alleging that the note was obtained from the defendant by the plaintiff upon a representation made by the plaintiff to the defendant that there was then due and owing from the defendant to the plaintiff a large sum of money, to wit, the sum in the note specified, as and for the deficiency in the amount of certain dividends payable to the plaintiff under and by virtue of a certain indenture of apprenticeship theretofore made between the plaintiff and the defendant; whereas in truth and in fact no such sum of money, or any part thereof, was ever due and owing by the defendant to the plaintiff as aforesaid, or otherwise. Upon the discussion of the rule in this case, the question for the decision of the *494] court was, whether, upon the plea as amended, and upon the evidence, the defendant was entitled to the verdict. It appears from the evidence, that the plaintiff did represent to the defendant that he was liable to pay the money, whereas in truth he was not; and that the defendant made and delivered the note declared on upon the faith of that misrepresentation. Inasmuch, therefore, as the plea would have been good if it had expressly alleged that the misrepresentation complained of was upon a matter of law, I am of opinion that the amendment was properly made. It was suggested in argument that the defendant was morally bound to pay the money, and that that would be a sufficient consideration. But the note was not in fact given for that consideration. It was further suggested that the giving up of the first note for 77l. was a sufficient consideration for the second note. But the second note was not in reality given by way of compromise for the first, but in substitution,—the whole in fact was one transaction. If the first note was without consideration, the second was equally so. I think the rule must be made absolute.

CRESSWELL, J.—I am entirely of the same opinion. The plea in *Forman v. Wright* is in substance a plea of absence of consideration to a certain amount. The decision the court now come to does not in any degree interfere with the doctrine that a small consideration may sustain a larger promise. Where there is a promise to pay a certain sum, all being, as in this case, supposed to be due, each part of the money expressed to be due is the consideration for each part of the promise; and the consideration as to any part failing, the promise is, *pro tanto*, *nudum pactum*. The rules of pleading require that a plea of no con-

sideration, to a bill or note, which *prima facie* imports consideration, shall show how the want of consideration arises. In the present case it is shown *thus,—by a statement that the note was obtained [*495 from the defendant by the plaintiff by a false representation that 32*l.* 6*s.* 10*d.* was due, when in fact 10*l.* 14*s.* 11*d.* only was due. The plea, it is true, goes on to state that that representation was made *fraudulently and deceitfully*. It was enough, however, that the representation was untrue: and, whether the misrepresentation was in a matter of fact or of law, is quite immaterial. The consideration for the note failed as to so much as the misrepresentation applied to.

The decision in *Forman v. Wright* necessarily involves that of *Southall v. Rigg* also.

WILLIAMS, J.—The plea in *Forman v. Wright* is a perfectly good plea of partial failure of consideration. It was not necessary to the validity of that plea, that the representation therein alleged should have been stated to be fraudulent and deceitful; nor was it necessary to prove it. Enough of the plea was proved to entitle the defendant to a verdict on that issue.

I also agree with the rest of the court, that the same principle must govern *Southall v. Rigg*.

TALFOURD, J., concurred.

Rules absolute.

END OF TRINITY TERM.

IN THE
FIFTEENTH YEAR OF THE REIGN OF VICTORIA. 1851.

The Judges who sat in Banco during this Term, were—

JERVIS, C. J.	WILLIAMS, J.
MAULE, J.	TALFOURD, J.

IN the vacation preceding this term, the following gentlemen were appointed Her Majesty's counsel learned in the law, and on the first day of the term took their seats within the Bar accordingly:—

John Baily. Esq., of Lincoln's Inn.

John George Phillimore, Esq., of Lincoln's Inn.

Brent Spencer Follett, Esq., of Lincoln's Inn.

John Mellor, Esq., of the Inner Temple.

William Bulkeley Glasse, Esq., of Lincoln's Inn.

Richard Davis Craig, Esq., of Lincoln's Inn.

Samuel Warren, Esq., of the Inner Temple.

Robert Pashley, Esq., of the Inner Temple.

George William Wilshere Bramwell, Esq., of Lincoln's Inn.

James Anderton, Esq., of the Middle Temple.

William Atherton, Esq., of the Inner Temple.

Thomas Emerson Headlam, Esq., of the Inner Temple.

Hugh Hill, Esq., of the Middle Temple.

Charles James Hargreave, Esq., of the Inner Temple.

In the same vacation, and by virtue of the statute 14 & 15 Vict. c. 83, Her Majesty appointed Sir JAMES LEWIS KNIGHT BRUCE, knight, and the Right Hon. Baron CRANWORTH, to be judges of the Court of Appeal in Chancery.

Richard Torin Kindersley, Esq., one of the Masters in Chancery, and James Parker, Esq., one of Her Majesty's counsel, were thereupon respectively appointed Vice-Chancellors, and received the honour of knighthood.

***BEARDSHAW v. The Right Hon. ALBERT Lord LON-
DESBOROUGH. Nov. 11. [*498**

An action against a contributory of a joint-stock company, in respect of a demand for which the company may be liable, is not necessarily an action against the company, or against a person authorized to be sued as nominal defendant, under the 50th section of the winding-up act, 1845, 11 & 12 Vict. c. 45.

Such an action is within the 62d section, which empowers the official manager, by leave of the master, to defend the same in his official name, or in the name of the original defendant.

ASSUMPSIT for money lent, money paid, and money had and received, and money found due upon an account stated.

Pleas,—first, as to so much of the declaration as relates to the money therein alleged to have been lent and advanced to, and paid, laid out, and expended for, the defendant, non assumpsit.

Secondly,—except as to so much of the declaration as relates to the money therein alleged to have been lent and advanced to, and paid, laid out, and expended for, the defendant,—that theretofore, to wit, on the 1st of September, 1845, divers persons, whose names were unknown to the defendant, projected a line of railway, to be constructed between Dover and Deal, in the county of Kent, by a public company to be called "The Dover and Deal Railway, and Cinque Ports, Thanet, and Coast Junction Railway Company;" and thereupon, afterwards, to wit, on the

day and year aforesaid, a committee was formed for the purpose of considering and carrying out the said project, and which committee was composed of divers persons, to wit, the defendant, and others whose names were unknown to the defendant: That afterwards, to wit, on the day and year aforesaid, it was determined by the said committee to form a public company, for the purpose of constructing the said railway, with a capital of 180,000*l.*, to be raised by 9000 shares of 20*l.* each; and that thereupon, afterwards, to wit, on the 2d of October, 1845, the said intended company was provisionally, and in all respects duly, registered, in conformity with the requirements of the

*499] *statute in that behalf, to wit, a certain act of parliament made, &c., for, &c.; and that divers persons, to wit, St. P. B. Hook, of, &c., and G. T. Thompson, of, &c., were then registered as the promoters of the said company, under the name of "The Dover and Deal Railway, and Cinque Ports, Thanet, and Coast Junction Railway Company;" and the said promoters thereof, from the time of such registration as aforesaid, thenceforth, used the said name of the said company, coupled with the words "registered provisionally:" That afterwards, to wit, on the day and year last aforesaid, the said promoters of the said company proceeded to form the same under such name and with such addition thereto as aforesaid, and for that purpose allotted and issued divers, to wit, 8000 of the said shares; and that divers, to wit, 100 of such shares were then allotted to the defendant, who then became and was, and remained, a shareholder in and a member of the said company; and divers other of the said 8000 shares, to wit, 200 thereof, were then also allotted and issued to the plaintiff,—*upon receipt whereof he paid to the said company, to wit, to the defendant and the other members of the said company, who then had and received from him, the plaintiff, a large sum of money, to wit, the said sum of money in the declaration supposed and alleged to have been paid and received for the use of the plaintiff, by way of deposit on the said shares so allotted and issued to him as aforesaid, and to be duly and lawfully applied for the purposes of the said company:* That the said promoters of the said company afterwards, to wit, on the 5th of February, 1846, applied to parliament for an act to incorporate the said company, but failed in obtaining it; and that the said company never was incorporated by act of parliament; whereupon the said money so as aforesaid had and received from the plaintiff became money had and received to his use, as in the declaration

*500] *mentioned: That afterwards, and before the making by the high Court of Chancery of the order next thereafter mentioned, to wit, on the 11th of January, 1850, in and by a certain petition and statement then made to and preferred before the Rt. Hon. Lord COTTENHAM, then lord high chancellor of Great Britain, in the High Court of Chancery, by one J. Short, then being a shareholder and member of the said company, it was stated, shown, and alleged to the said court, that,

in or about the month of October, 1845, the said company was projected under the name of, &c., for making a railway from Dover to Deal, in the county of Kent, for the carriage and conveyance of passengers and goods; that the said company was, in or about the said month of October, 1845, duly provisionally registered pursuant to and under the provisions of the first-mentioned act of parliament; that the capital of the said company was 180,000*l.*, in 9000 shares of 20*l.* each, with a deposit of 2*l.* 2*s.* per share; that the prospectus issued by the projectors invited parties to take shares in the said company, and contained a form of application for shares; that a portion of the said shares was allotted and paid upon, and that divers persons more than fifty in number had shares allotted to them, and paid the said deposit of 2*l.* 2*s.* on the shares so allotted; that 100 shares were allotted to and taken by the said J. Short, and that he paid into the hands of the bankers of the said company the sum of 210*l.*, being the deposit of 2*l.* 2*s.* on each of the said 100 shares, and that he and divers other persons to whom shares had been allotted, and who had accepted such shares, and had paid the said deposit of 2*l.* 2*s.* per share thereon, respectively, executed the subscription agreement and parliamentary contract in respect thereof; that divers other persons applied for shares in the said company, and agreed in writing to take such number of shares as might be allotted to them, and pay the deposit *thereon respectively, and accordingly shares were allotted to [*501 the last-mentioned persons, and that the said last-mentioned persons, after such last-mentioned allotments, refused or neglected to take such shares or to pay the deposits thereon, by means whereof the liability of the petitioner and of the other persons who took shares in the said company, and paid their deposit thereon, for contribution to the expenses of the said undertaking, was considerably increased; that the said J. Short became as aforesaid, and then was, a member and contributory of the said company within the intent and meaning of the joint-stock companies' winding-up acts, 1848, and 1849, and entitled to a share of the assets of the said company; that the said company, or the directors thereof, solicited and made and proceeded in an application to parliament for a bill for the purpose of the construction of the said railway and works, or some portion thereof, but were unsuccessful in obtaining the said bill; that the directors of the said company, in the exercise of the powers conferred upon them, also laid out and expended large sums of money in prosecuting the said undertaking, out of the deposits so paid by the said J. Short and the said other persons as aforesaid, and incurred liabilities in respect thereof, and that divers of such liabilities were then outstanding, and that there was then in the hands of the said directors, or the solicitors to the said company, a large sum of money, the produce of the deposits paid by the said J. Short and the said other allottees, in respect of the shares so taken by them as aforesaid; that the said company had been dissolved, and ceased to carry

on business, and the secretary and clerks of the said company discharged, and the place of business of the said company abandoned, although the affairs of the said company had not been fully wound up; and that the said J. Short was desirous that the said company might be

***502]** wound up under the said joint-stock companies' *winding-up acts, 1848, and 1849; the said petitioner did therefore pray that the said company might be absolutely wound up under the provisions of the said joint-stock companies' winding-up acts, and that it might be referred to one of the masters of the said court to wind up the affairs of the said company,—*prout patet*, &c.: That the said matters and things so as aforesaid stated, shown, and alleged in the said petition, did, in the opinion of the said Court of Chancery, render it just and equitable that the said company should be absolutely wound up under and according to the provisions of the said joint-stock companies' winding-up acts, 1848, and 1849; and that the said petition was afterwards and before the making of the said order absolute for winding up the said company thereafter mentioned, to wit, on the 15th of January, 1850, duly advertised, as by law required in that behalf, to wit, in the London Gazette, and was, to wit, then, together with a copy of the said London Gazette wherein the said order was advertised as aforesaid, served at the head and only office of the said company, situate, &c., upon the proper party in that behalf, to wit, the solicitor, and one of the registered promoters of the said company, to wit, one St. P. B. Hook: That afterwards, to wit, on the 25th of January, 1850, by a certain order of the said High Court of Chancery, then made by the then vice-chancellor of England, to wit, &c., to whom the said petition had been duly referred by the said lord high chancellor, it was ordered that the said company should be absolutely wound up under the provisions of the said joint-stock companies' winding-up acts, 1848, and 1849, and that it should be referred to the master in rotation of the said court, to wind up the affairs of the said company, under the provisions of the said acts,—*prout patet*, &c.: That thereupon, afterwards, and after the making of the said order absolute, to wit, on the 1st of February, 1850, the said

***503]** *order absolute was carried in before the said master in rotation to whom the winding-up of the affairs of the said company was so referred as aforesaid, to wit, &c.; and that, by and pursuant to the direction of the said master, then made in that behalf, an advertisement was, to wit, on the 5th of February 1850, and another similar advertisement was, to wit, on the 8th of February, 1850, inserted and published in all respects as by law required in that behalf, to wit, by the proper persons in that behalf, to wit, by the party then having the prosecution of the said petition, to wit, by W. B. and F. D., in two successive numbers of the London Gazette, bearing date, to wit, the two several days last aforesaid, and also twice in three other newspapers approved by the said master in that behalf, to wit, the Times and Morn-

ing Chronicle newspapers respectively of and on the 5th and 11th of February in the year last aforesaid, and a certain other newspaper called the Dover Telegraph, of the 9th of February last aforesaid; by which said advertisements notice was duly given that the said master would, at a day, hour, and place therein mentioned, being a day within fourteen days from the day of the publication of the first of the said advertisements, to wit, at 12 o'clock at noon on the 16th of February, 1850, at his the said master's chambers, in, &c., proceed to appoint an official manager of the said company under the said joint-stock companies' winding-up acts, 1848, and 1849: That afterwards, and within fourteen days from the publication of the first of the said advertisements, and before the commencement of this suit, to wit, at the said time and place in the said advertisements mentioned, the said master did, by writing under his hand, duly appoint one H. C. to be official manager of the said company; and the said H. C. then accepted the said appointment, and then became and was, and from thence continually until the commencement of this suit had been, and still was, [*504 the official manager of the said company duly appointed in that behalf: That every step, matter, proceeding, and thing required by law towards the winding-up of the said company according to the statutes in that behalf had been duly had and taken: That the having and receiving in that plea mentioned was the having and receiving in the declaration mentioned, "with this that the defendant avers, as the fact was and is, that he never had and received the said money otherwise than as aforesaid, and that the said promise in the declaration mentioned, so far as relates to the money therein alleged to have been had and received to the plaintiff's use, and to have been found due on an account therein alleged to have been stated, is a promise implied by law from the said alleged receipt of the said money, and from the premises, and not otherwise; and that this action is brought by the plaintiff against the defendant as, and being, a member of the said company, and not upon, nor does the same in anywise arise out of, the individual liability of the defendant, apart from the said company; and that the same action is substantially and in effect an action against the said company; and the defendant further says, that the said account in the declaration mentioned, was so stated as therein alleged, of and concerning the said money so by the plaintiff paid by way of deposit as in this plea aforesaid, and so had and received as aforesaid, and not otherwise,"—verification.

Special demurrer to the second plea, assigning for causes,—that this is not an action against the company in the plea mentioned, but against the defendant only;—that the plea shows no obligation on the plaintiff, by statute or otherwise, to sue the official manager of the company instead of the defendant;—that, if the action *were* against the company, it would not be *obligatory* on the plaintiff to sue the official

manager, though he *might* do so; that the plea does not show that the
 *505] *plaintiff had any cause of action against the company, or could
 have sued them at all;—that it should have shown the facts
 which made the company liable to the plaintiff for money received to
 his use, and on an account stated with him;—that it does not show any
 facts from which the court can see that the company became indebted
 to the plaintiff for money received to his use, and that the allegation in
 the plea contained in the words following, “whereupon the said money
 so as aforesaid had and received from the plaintiff, became money had
 and received to his use, as in the declaration mentioned,” is a mere
 allegation of a matter of law, not warranted by the facts stated in the
 plea, and not issuable or traversable;—that the plea does not traverse
 or confess and avoid the part of the declaration to which it is pleaded;
 that it amounts to an argumentative and circuitous denial that the de-
 fendant was indebted to the plaintiff for money received to his use, or
 on an account stated, and to the general issue;—that it does not show
 the company to have been one which fell within the provisions of the
 joint-stock companies’ winding-up acts of 1848, or 1849;—that the
 allegation in the plea, that the action is substantially and in effect an
 action against the company, is not supported by the facts stated in
 the plea, and is not in itself an issuable or traversable allegation;—
 that the plea does not show that the account stated was ever stated by
 or with the company, or with any other person than the defendant,
 or that the company ever were indebted to the plaintiff on the said
 account stated.

J. Brown (with whom was *Channell*, Serjt.) in support of the demur-
 *506] rer.(a)—The substantial defence *attempted to be set up by this
 plea, is, that this is an action against a company ordered to be
 wound up under the provisions of the statute 11 & 12 Vict. c. 45, and
 therefore should have been brought against the official manager. That
 statute, however, it is submitted, does not apply to the case of an indi-
 vidual member of a company sued *per se*. The 50th section of that act
 enacts, “that, after the appointment of any official manager under this
 act, all actions, suits, and other proceedings, at law or in equity, which
 might have been commenced, instituted, or prosecuted by or on behalf
 of the company with respect to which such appointment shall be made,
 against any persons, whether contributories of the company or not,
 shall be commenced or instituted and prosecuted by the official manager,

(a) The points marked for argument on the part of the plaintiff, were,—“That this is not an
 action against the company in the plea mentioned, or against a person authorized to be sued as
 the nominal defendant on behalf of the same, within the meaning of the 11 & 12 Vict. c. 45; and
 that the plea shows no obligation on the plaintiff, by that statute, or otherwise, to sue the official
 manager: That the plea does not show that the plaintiff had any cause of action against the
 company, either for money had and received, or on the account stated: And that the plea does
 not confess any cause of action against the defendant, and amounts to the general issue, and should
 have been pleaded in that form, or, if it *does* confess any cause of action, it shows no avoidance
 thereof.”

by the style and designation of 'the official manager' of such company (describing it under the style or firm by which it is described in the order absolute), as the nominal plaintiff or petitioner for and on behalf of such company, and that whether there be one or more official manager or managers, and that all debts which might have been proved by or on behalf of the company against the estate of any bankrupt or insolvent debtor to the company, shall and may be proved against such estate by the official manager of such company, by the style and designation aforesaid; and that all actions, suits, and proceedings, at law or in equity, to be commenced or instituted by any persons, whether contributories of such company or otherwise, against *such company, or any person duly authorized to be sued as the nominal defendant on behalf of the same, shall and lawfully may [*507 be commenced, instituted, and prosecuted against the official manager of such company (by such style and designation as aforesaid), as the nominal defendant for and on behalf of such company, and that whether there be one or more such official manager or managers." The first section enacts that the act shall apply to all companies, corporate or unincorporate, within the provisions of the 7 & 8 Vict. c. 111 (including all companies existing on the 1st of November, 1844, and which shall have obtained or shall obtain a certificate of registration under the 7 & 8 Vict. c. 110), and to all companies which would have been within the provisions of the 7 & 8 Vict. c. 111, if they had not been dissolved, or had not ceased to trade, at the time of the passing thereof, and to all banking companies which would have been within the provisions thereof if they had not been specially excepted from the provisions of the registration act of 7 & 8 Vict. c. 110. Assuming this to be a company within the contemplation of the statute, the plea discloses no defence under the 50th section. The 58th section affords some guide to the construction of the 50th: it enacts, "that, except as is by this act expressly provided, nothing in this act contained, nor any petition or order under the same for the dissolution and winding up, or for the winding up of any company, shall extend or enlarge, diminish, prejudice, or in any wise alter or affect, the rights or remedies of creditors, or other persons not being contributories of the company, or the rights or remedies of creditors being also contributories, but being creditors of the company upon a distinct and independent account, whether against the company or against any of the contributories of the same, nor the rights or remedies of the company against any contributories or other persons, nor shall alter or affect any contracts or engagements *entered into by or with the company, or any per- [*508 son acting on behalf of the same, previously to any such petition, nor any actions, suits, or other proceedings pending at the date of such petition." It cannot be said that this is an action against the company or against a person duly authorized to be sued as the nominal

defendant on behalf of the company: that applies to the public officer. [MAULE, J.—This defendant is sued as one of several co-contractors. If the whole body had been sued, the case would have been within the act. The question is, whether this is not substantially an action against the company.] This plea, to be good, must amount to this, that this is an action at law *against the company*: if the defendant denies that on the very face of his plea, he cannot arrive at the proposition that the action is one which ought to have been brought against the official manager. If the plea amounts to a negation of the contract or debt alleged in the declaration, it is demurrable. [MAULE, J.—Does the plea show that there are any other members of the company existing?] It does not show that they are dead or out of the kingdom. This is, in truth, an action against a contributory, as to which the act contains express provisions. The 51st section provides for the prosecution of criminal proceedings on behalf of the company. The 52d and 53d sections respectively provide for the prosecution of *pending* actions and suits against or by the company. [JERVIS, C. J.—What pending actions could there be before complete registration?] The powers and privileges possessed by companies provisionally or completely registered, are defined by the 7 & 8 Vict. c. 110, ss. 23, 25. The 56th section provides that all orders and decrees of a court of equity against the official manager shall take effect against the company. The 57th section is important: it enacts “that all judgments which shall be entered *509] up in any action at law against the official manager of any *such company, shall have the like effect and operation upon and against the property of such company, and upon and against the persons and property of the contributories thereof, and shall be enforced in like manner, as if such judgments had been entered up against such company, or against any person duly authorized to be sued on behalf of the same.” The 62d section enacts “that it shall be lawful for the official manager, with the leave of the master, to be signified by writing under his hand, to defend, either by his official style and designation, or in the name of the original defendant, any action or suit brought against any individual contributory of the company: but that, in such case, any judgment or decree to be obtained by the plaintiff shall have the same effect, but no further or otherwise, than if the same had been obtained against the original defendant in such action or suit.” The 71st section provides for the proof of debts before the official manager. And the 73d section enacts, “that, after the first appointment of an official manager, no creditor or other person shall, except so far as the master shall permit, have power to commence or to proceed with any action against the official manager, or against the company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the master, as hereinafter men-

tioned; and it shall be lawful for any judge of the court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the master." The defendant has not brought himself within that section: the plea does not allege that the plaintiff has made no proof. [MAULE, J.—It would be no answer if it had.] These various provisions, at all events, show that the 50th section does not apply to this *case. In *Prescott v. Hadow*, 5 Exch. 726,† it was held that a creditor who has sued a contributory to and shareholder in a [*510 joint-stock company, and has had his action stayed under section 73, until after he shall have made or exhibited proof of his debt before the master, may, upon the allowance of such proof by the master, and without any further step, proceed with his action. It has been decided in two cases in equity,—In *re The India and Australia Steam-Packet Company*, 17 Simons, 15, and In *re The Dover and Deal Railway Company*, 17 Simons, 18,—that the court has no jurisdiction to restrain a creditor from suing one of the members of the company, on the ground that an order for winding up the company under this act has been obtained. It is clear, therefore, that a creditor has a right to proceed either at law or in equity after proof before the master; and that the 50th section applies to actions against the company, and not to an action against an individual committee-man. Besides, it is by no means clear that this act applies at all to companies not *completely* registered.

Willes (with whom were *Byles*, Serjt., and *Bramwell*), *contra*.(a)—This question arises upon the meaning of the word "company" in the 50th section of the 11 & 12 *Vict. c. 45. But little assistance [*511 is afforded by the interpretation clause, s. 3, which provides that "the word 'company' shall mean, any partnership, association, or company, corporate or unincorporate, to which this act applies." The company in this case is, the body of persons who are liable to the debts in respect of which the statute enacts that inquiry shall be made before the master. The defendant is a provisional committee-man of a projected railway company, to whom shares have been allotted. The

(a) The points marked for argument on the part of the defendant, were: "that the plea shows that this is an action against the company, and is a good plea under the 50th section of the 11 & 12 Vict. c. 45, and that such statute renders it imperative on the plaintiff to sue the official manager of the company, and that the plea sufficiently indicates such obligation: That, at all events, the plea shows a suspension of the plaintiff's remedy under the 73d section of that act: That it sufficiently admits a cause of action in the plaintiff, and clearly shows, that, at one point of time, that is, that between the failure of the company to obtain an act of parliament and the obtaining of the order to wind up the company, the plaintiff had a cause of action against the defendant, and that such right was subsequently transferred or suspended, under the winding-up acts of 1848 and 1849: That it shows that the company was one within the provisions of those acts: That the cause of action upon the account stated, identified as it is with the claim for money had and received, was transferred by the operation of the statute mentioned in the plea: That no partnership appears by the plea to have existed between the plaintiff and the defendant; and that the objections to the plea in point of form are not tenable."

only persons liable as contributories are the directors and those who have, by taking shares, or by some other act, shown that the proceedings for establishing the company have been taken upon their authority. Until the company is effectually formed, and completely registered, the only persons who are members are those who are liable for the preliminary expenses. The 23d section of the 7 & 8 Vict. c. 110, shows that all acts necessary for the constitution of the company may be done before complete registration. This clearly is a company within the act: *Ex parte Barber*, 1 M'N. & Gordon, 176, establishes this. A mere allottee of shares is not a contributory; but a provisional committee-man, who is also a shareholder, is: see *Pitchford v. Davis*, 5 M. & W. 2,† *Walstab v. Spottiswoode*, 15 M. & W. 501;† *In re The Direct Birmingham, Oxford, &c., Railway Company*, *ex parte Walstab*, 20 Law Journ., N. S., Chan. 58; *Norris v. Cottle*, 2 House of Lords Cases, 647; *Hutton v. Upfill*, 2 House of Lords Cases, 674; *Ex parte Maudslay*, 20 Law Journ., N. S., Chan. 9; **Ex parte Upfill*, 20 Law Journ., N. S. Chan. 480; *In re The Direct Exeter, Plymouth, &c., Railway Company*, *Ex parte Besley*, 15 Jurist, 523. The statement in the plea shows, therefore, that the plaintiff is not a member of the company, and that the defendant is. In *Hutton v. Upfill*, Lord BROUGHAM emphatically says:(a) “I wish it to be most distinctly understood, and it is of the greatest importance, that it is upon the two facts taken together that the judgment proceeds. One of them is found at law not to be sufficient without the second; and it is a question whether the second is sufficient without the first. However, the decision of the House goes upon both points concurring, namely, the fact of the party being, by his own choice, a provisional committee-man, *plus* his acceptance of shares.” [MAULE, J.—You say the plea sets up a defence under section 50?] Yes. [MAULE, J.—There are no prohibitory words there.] It is not necessary that there should be: *Chapman v. Milvain*, 5 Exch. 61.† There, a company of persons established for the purpose of carrying on the business of bankers under the provisions of the 7 G. 4, c. 46, in an action against a shareholder for the recovery of a debt, or for enforcing any claim or demand due to the copartnership, are *bound* to sue in the name of one of their public officers, and are not at liberty to sue in the names of the covenantees named in the deed of copartnership: the words of the 9th section of that act, “shall and may” are obligatory, and not merely permissive. [MAULE, J.—Is the 50th section pleadable in bar?] *Steward v. Greaves*, 10 M. & W. 711,† decided on the 9th section of the 7 G. 4, c. 46, shows that it is. [MAULE, J.—*Steward v. Greaves* may have been very properly decided without deciding this case. Has any case held, that, if, after an order for winding up under *513] the act has been obtained, an action is brought against the company or against a member or contributory, the act may be

(a) 2 House of Lords Cases, 694.

pleaded in bar?] None. [MAULE, J.—*Steward v. Greaves* certainly goes to no such length. There was no need of negative words there, because the whole capacity of suing and being sued depends upon the act; which is not the case here.] The 50th and 73d sections stand apart—in totally distinct divisions of the act: from s. 50 to s. 52, the legislature is dealing with actions by and against the company after the appointment of an official manager. The earlier part of the 50th section clearly takes away the capacity of the company to sue. [MAULE, J.—That probably is a bar.] Then follows, in precisely similar words, the provision for actions *against* the company. [MAULE, J.—Suppose an action is brought against the company after the issuing of the order under the winding-up acts,—would the case fall within the 73d section?] Undoubtedly. [MAULE, J.—Then the proceedings might be stayed until proof of the debt or claim, and after proof the plaintiff may go on. JERVIS, C. J.—It is impossible that the plaintiff could have a right to go on, and that the defendant should have a right to plead in bar under s. 50.] The 73d section does not point to the same sort of actions to which the 50th section applies, though it is true it includes the actions mentioned in s. 50, because it applies to *all* actions. Where an act of parliament gives a defence in bar to a number of persons, and an action is brought against one, the latter is not bound to plead in abatement: *Stackwood v. Dunn*, 3 Q. B. 822 (E. C. L. R. vol. 43). [MAULE, J.—It may be possible to satisfy the 73d section consistently with the 50th, by reading the latter in this way:—If a suit be commenced against the company *after* the appointment of an official manager, it must be brought against that officer, by s. 50: and the 73d section provides, that no action shall be commenced or proceeded with against the *official [*514 manager, or the company, or any person representing the same, or a contributory, until after proof; and such action, if brought, or pending, may be stayed until after proof. The 73d section does not apply to the same case as the 50th does, because it assumes that the action it is dealing with was lawfully and properly brought. If improperly brought, the 73d section leaves it to the operation of s. 50, which in that case is an absolute bar.] In *Macgregor v. Keily*, 4 Exch. 801,† an action having been brought against the defendant, a provisional committee-man of a railway company provisionally registered, for work done for and on behalf of the company, and judgment having been recovered against him, and a writ of *ca. sa.* issued thereon, an order absolute was made for winding up the affairs of the company under the 11 & 12 Vict. c. 45, and an official manager was appointed: and the court stayed the proceedings until after proof by the plaintiff of his debt before the master, under s. 73. [JERVIS, C. J.—That was an action against a contributory.] The effect of the latter branch of the 50th section must be the same in all cases. Other sections, the 52d and 62d for instance, show that the word “shall” was intended to have

its full effect in s. 50, and that the legislature did suppose such a state of the record as that the official manager might represent a contributory. [WILLIAMS, J.—Section 52 provides for the substitution of the official manager, in pending actions, by suggestion on the roll,—a very awkward proceeding.] In *Armstrong v. Normandy*, 5 Exch. 409,† such a suggestion *was* entered. [WILLIAMS, J.—In that case, the suggestion was not as it must be here; it was a suggestion that “the action was commenced and had hitherto been prosecuted against Crozier as the *nominal defendant* on behalf of the company.”] There would be no difficulty in suggesting here in substance the facts alleged in the plea.

*515] If the *argument on the other side be held to be well founded, the result will be altogether to repeal the 50th section. [WILLIAMS, J.—Must not the plea, to be good, show that an action might have been commenced against the company? Is not that the essence of the plea? Can you construct a company without showing a joint liability?] The plea contains a sufficient denial to bring it within the rule laid down in *Harmer v. Steele*, 4 Exch. 1.† [JERVIS, C. J.—Suppose the plaintiff wishes to say that he is not suing Lord Londesborough as a member of the company,—what allegation in the plea is he to traverse?] He might reply that this is not an action against the company, or against the defendant as a member of the company, concluding to the country. [JERVIS, C. J.—Then that would be the only question put in issue by *de injuria*.] It may be that the plaintiff ought to new assign: *Rogers v. Custance*, 1 Q. B. 77 (E. C. L. R. vol. 41). In the absence of a special demurrer, the general allegation that the action is brought against the defendant as a member of the company, is sufficient: *Braham v. Watkins*, 16 M. & W. 77.† It is submitted that this is an action which ought to have been brought against the official manager of the company; and that the defence properly arises under s. 50, and is pleadable in bar, and not in abatement. [MAULE, J.—If our judgment be for the defendant, will it be pleadable in bar to another action for the same cause against the official manager?] If it be, it will be the plaintiff's own fault.

Brown, in reply.—Assuming that “company” in the plea means the same as in the act of parliament, the plea does not show that such a company was ever formed. The plea contains a variety of allegations of fact, from which it is sought to be inferred that this is an action against the company. But there is no confession; on the contrary, the plea, *516] if it amounts to anything, amounts to a denial *of the cause of action stated in the declaration. This is not an action against the company at all, and therefore not governed by the 50th section of the act; but it is an action against a contributory, within the 62d section.

JERVIS, C. J.—I am of opinion that the plea in this case is no answer to the action, and that the plaintiff is entitled to the judgment of the

court. I have entertained some doubt during the course of the argument, arising partly from the obscure wording of the statute, and partly from the various decisions upon it in the Court of Chancery. But, upon carefully looking at the 50th section, and contrasting it with other parts of the act, I think it plain that that section is not capable of the construction which is sought to be put upon it by Mr. *Willes*, and that this is not an action which ought to have been brought against the official manager of this company. The object of the act was, to enable the promoters of unsuccessful schemes of this sort to wind up the affairs of the company, and to compel the shareholders to contribute funds for payment of their debts. But the statute is cautiously and studiously framed so as not to vary or affect the rights of creditors. It is unnecessary now to consider what was the original intention of the legislature. It has been decided that companies which are not registered or incorporated are within the meaning of the statute: and it is said, that, the courts of equity having determined that one who has taken an active part in the formation of the company, and to whom shares have been allotted, is a member of the company for the purpose of having it wound up, such a person is a member of the company for all purposes; and that an action against one member of the company is an action against all. It is true that an action against one is virtually an action against every member of the company, since all are liable to contribution. But I do not think *it necessarily follows that we are bound to put the same interpretation upon the word "company" in s. 50, and to hold that [*517 all actions against a member of the company must be brought against the official manager; for, in that case, we should not be giving full effect to s. 62. The statute contemplates two sorts of actions after the commencement of proceedings towards winding-up, —the one, against the company, to which all the members are liable, and that must be brought against the official manager,—the other, where individual members are sued by name, as contributories, in which case, the official manager may, by leave of the master, defend in their name or his own, under s. 62. It has been contended by Mr. *Willes*, that every contributory is a member of the company, and that the company is sued when a contributory is sued. If that were so, no effect at all would be given to the 62d section. But I think we may give full effect to both the 50th and the 62d sections, if we hold that the former applies where the company is sued *quâ* company, and then the action must be against the official manager; but that, if the action is brought against individual members of the company, it may be brought against them in their own names, and then the official manager may come in and defend in the manner pointed out in s. 62. Now, this operates no injustice, because, if you sue the company, in the name of the official manager, and recover judgment against him, each contributory is liable. If you sue a contributory, whether the official manager defends or not, if you get judgment, the

individual contributory is liable by the provisions of the statute: and the only consequence is this, that, if the creditor elects not to sue the company, he has only the security of those whom he elects to sue as contributories; whereas, if he sues the company, he has that of all the individual members. It seems to me that there is no hardship in this, *518] and that it is the only *reasonable construction to put upon the act: and therefore, that, inasmuch as this plea does not show that the company, *quâ* company, is sued here, it does not show any defence, and consequently there must be judgment for the plaintiff.

MAULE, J.—I am of the same opinion. It seems to me that this plea fails to establish a defence to this action, in respect of its failing to show that it is an action against the company within the 50th section of the 11 & 12 Vict. c. 45. I agree that it has been decided, and I think rightly decided, that a company consisting of persons not registered under the 7 & 8 Vict. c. 110,—such as are commonly called promoters of a scheme,—may be, and are, a “company” within this act of parliament. But it by no means follows that this action, being an action against Lord Londesborough in his own name, is an action against the company within the meaning of sect. 50. On the contrary, I think the proper construction of the act, as well as the convenience and justice of the case, lead us to the conclusion that this is *not* an action against the company. The implicit and most obvious sense of “action against the company” is, where you can see by the proceedings themselves that the action is against the company. Another alternative is mentioned in the section,—“or any person duly authorized to be sued as the nominal defendant on behalf of the same.” That clearly is to be determined by what appears upon the record; and it seems to me to afford a reason for considering that the words “actions against the company” mean actions brought against the company *by name*, or against a person duly authorized to be sued as nominal defendant on behalf of the company. The defendant’s construction would comprehend within the clause a third and much more remarkable class, viz. actions against parties who, though not sued as nominal *519] *defendants, or described as the company, are nevertheless charged with the liabilities of the company. The 62d section throws a great deal of light upon the case: it provides “that it shall be lawful for the official manager, with the leave of the master, to be signified by writing under his hand, to defend, either by his official style and designation, or in the name of the original defendant, any action or suit brought against any individual contributory of the company; but that, in such case, any judgment or decree to be obtained by the plaintiff shall have the same effect, but no further or otherwise, than if the same had been obtained against the original defendant in such action or suit.” If a plaintiff, after the passing of this public act, improperly sues the company, his failure is the proper reward of his own folly. But if, where the defendant is not described as a member of the com-

pany, you are to hold the defendant to be entitled to bar the plaintiff, and to put him to a most inconvenient and expensive inquiry before a jury, as to whether the defendant is or is not to be considered as a member of or as representing the company, you would be unfairly imposing upon him an inquiry which is wholly collateral to the merits of the case; for, if the defendant succeeded, the plaintiff would still have his good cause of action remaining, only it must be enforced by action against the official manager; and, if the plaintiff succeeds, it is at the price of being encumbered with evidence which is wholly immaterial between the parties. That difficulty does not arise where the action is against the company, and is apparently so upon the record. If the master, in the exercise of his discretion under s. 62, thinks that the case is a fit one to be defended by the official manager, he may authorize that to be done; and then the plaintiff will have all his rights as he had before. That seems to me to be a convenient, an adequate, and a fit mode of proceeding in the case of an action such as this, against an individual. The general *scope and spirit of the act I apprehend to be this,—that companies who are minded to wind up [*520 their concerns shall be at liberty to do so; but that third persons who are not members of the company, and who have claims against the company, are not to be in any degree prejudiced; they are to be able to maintain the same actions, and maintain them by the same evidence, and, having obtained judgment, they are to have execution against the same persons, and to be in all respects just as well off as they were before, except as regards certain formal and immaterial matters, which, without at all prejudicing the interests or the convenience of the plaintiff, may be useful in furthering the object of the company, viz. the winding-up of its affairs. That is in a great degree embodied in the 58th section, which enacts, “that, except as is by this act expressly provided, nothing in this act contained, nor any petition or order under the same for the dissolution and winding up, or for the winding up, of any company, shall extend or enlarge, diminish, prejudice, or in anywise alter or affect the rights or remedies of creditors, or other persons, not being contributories of the company, or the rights or remedies of creditors being also contributories, but being creditors of the company upon a distinct and independent account, whether against the company or against any of the contributories of the same, nor the rights or remedies of the company against any contributories or other persons, nor shall alter or affect any contracts or engagements entered into by or with the company, or any person acting on behalf of the same, previously to any such petition, nor any actions, suits, or other proceedings pending at the date of such petition.” Now, where any right is expressly taken away by the act, it is always accompanied by the gift of a perfect equivalent. The official manager is to be sued in certain cases; but, in those cases, the plaintiff is to be as well off in all respects as if he had sued the

*521] *company, or the individuals whom he would have sued but for this act. In the course of the argument, I put a case, in which, if it were held that an action like this could not be brought against an individual member of the company, but must be brought against the official manager, a substantial right would be taken away from the plaintiff. Before the passing of this act, and independently of the act, the plaintiff might have a cause of action against the defendant as a member of the company, and another cause of action against him in his individual character,—for instance, he might have a claim for goods sold to the defendant, and another for goods sold and delivered to a company of which the defendant was a member,—and, if the plaintiff was sure he could sustain one of those claims, he would have the advantage of trying his right to the other at the defendant's expense. The statute does not take away that right. It would be going into too much detail to clear away the hypothetical difficulty of what might arise from a plea in abatement. Cases may be assumed in which there could be no possibility of a plea in abatement. I can conceive the defendants might consist of a number of persons not called a company, but constituting the whole of the contracting parties; and it might be that the plaintiff brought his action against them in respect of several causes of action which are properly joinable. Now, if we are to hold that the 50th section of this act applies to an action where the defendants are not called a company upon the record, then we must say that a portion of that action would be barred, and that the plaintiff would be compellable to support both his alleged causes of action. That is an inconvenience,—a substantial inconvenience,—which I am sure the act of parliament never intended to cast upon a plaintiff. Other cases of inconvenience might without difficulty be suggested. The construction we are putting upon the

*522] *statute, is, as it seems to me, not only the literal, but also the most convenient construction of which it is susceptible. Seeing, therefore, that the construction suggested by the defendant's counsel would, in cases obviously of frequent occurrence, materially and seriously affect rights of the plaintiff, which the statute intended carefully to preserve, I come without hesitation to the conclusion to which my Lord Chief Justice has come, that this plea is not a good bar to the plaintiff's declaration.

WILLIAMS, J.—I also am of opinion that this plea is bad, because I think this is not an action commenced against the company within the meaning of the 11 & 12 Vict. c. 45, s. 50. It cannot be so held, without extending the language employed beyond its strict natural meaning. I do not feel inclined to do that, seeing the difficulties,—not to say the injustice,—in which the plaintiff would be involved, whether upon the trial of such an issue as this, or on the general issue, if this were, as suggested, an action which must be brought against the official manager, in ascertaining in point of fact, who were the persons who constituted

the company against whom the action is brought. Upon the whole, therefore, I concur in the view which has been taken by my Lord Chief Justice and my Brother MAULE, and in the reasons which they have assigned: and my opinion is not a little strengthened by the anomalies and the difficulties which this very argument shows are to be encountered in framing a plea founded upon the construction of the statute for which Mr. *Willes* has been contending.

TALFOURD, J.—I entirely concur in the opinions expressed by my lord and my learned Brothers. The *reasons have been so fully [*523 given, that it is quite unnecessary for me to add anything.

Willes prayed leave to amend, by withdrawing the plea, and pleading non assumpsit. He stated that a judge at chambers had refused to permit the above and other pleas to be pleaded together, and that the defendant had elected to plead it alone, for the purpose of raising the point.

MAULE, J.—Perhaps you speculate upon raising it again on non assumpsit, or by bill of exceptions.

Willes.—The defendant will abide by the decision just pronounced for the first time in a court of law upon this important point, and will undertake not to bring a writ of error.

Brown submitted that there ought at least to be an affidavit of merits.

MAULE, J.—I think you purchase a considerable advantage by the amendment. I am afraid the defendant will suffer by giving up his writ of error.

Per Curiam.—Leave to amend, by withdrawing the plea demurred to, and pleading non assumpsit, within a week, upon payment of costs.
Rule accordingly.

*CROSSE v. SEAMAN. Nov. 25.

[*524

A plaintiff who recovers in an action of debt a sum which together with a sum paid into court on a plea of tender exceeds 20*l.*, is entitled to the costs of the action, notwithstanding the 11th section of the 13 & 14 Vict. c. 61.

THIS was an action of debt brought to recover the sum of 26*l.* 1*s.* 5*d.* for work and labour done by the plaintiff as a proctor for the defendant, and for money paid, and money due upon an account stated.

The defendant pleaded,—first, except as to 7*l.* 15*s.*, never indebted,—secondly, except as to 7*l.* 15*s.*, payment,—thirdly, as to 7*l.* 15*s.*, tender before action brought, and payment of that sum into court.

The plaintiff joined issue on the first plea, traversed the second, and entered a *nolle prosequi* as to the third.

At the trial before MAULE, J., at the first sitting in London in Easter Term last, a verdict was taken for the plaintiff, by consent, for 18*l.* 6*s.* 5*d.* The learned judge did not certify under the 113th section of the 10 & 11 Vict. c. lxxi., or under the 12th section of the 13 & 14 Vict. c. 61.

The defendant afterwards applied to the court for a suggestion to deprive the plaintiff of costs, on the ground that he had recovered by *verdict* a less sum than 20*l.* But that rule was refused,—the court holding that the 113th section of the statute first above referred to, did not apply to the case of a recovery of a debt reduced by payment into court under a plea of *tender*, to a sum of less than 20*l.*(*a*)

The master having refused to tax the plaintiff his costs of the action, without the order of the court,

Willes, on a former day in this term, obtained a rule nisi that the master should be at liberty to tax such costs.

*525] *Brewer* now showed cause.—The master was right in refusing to tax the costs in question. The 11th section of the county court extension act, 13 & 14 Vict. c. 61, enacts, “that, if, in any action commenced after the passing of this act in any of Her Majesty’s superior courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall *recover* a sum not exceeding 20*l.*, &c., the plaintiff shall have judgment to *recover* such sum only, and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any plaintiff be entitled to costs by reason of any privilege as attorney or officer of such court or otherwise.” This action was commenced after the passing of that act, and the plaintiff has *recovered* less than 20*l.*; and the act applies to every action of the descriptions mentioned, brought in the superior courts. “*Recover*” means obtain by verdict and judgment: *Brooks v. Rigby*, 2 Ad. & E. 21 (E. C. L. R. vol. 29), 4 N. & M. 3 (E. C. L. R. vol. 30). [MAULE, J.—The spirit of the thing is, that the plaintiff shall not lose his costs where he has obtained by the action more than 20*l.* Here, he has got the money. Common sense still lingers in Westminster-Hall. JERVIS, C. J., referred to *Prew v. Squire*, 10 C. B. 912 (E. C. L. R. vol. 70), 2 L. M. & P. 346.]

Willes was not called upon.

JERVIS, C. J.—It is clear that the plaintiff has got more than 20*l.* by his action. We think he is entitled to costs.

Rule absolute.(*b*)

(*a*) 1*d* C. B. 884 (E. C. L. R. vol. 70), 2 L. M. & P. 273.

(*b*) The recent city of London small debts act, 15 & 16 Vict. c. lxxvii.,—which repeals the 10 & 11 Vict. c. lxxi.,—by the 37th section enacts that “none of the provisions and enactments of the 13 & 14 Vict. c. 61, or of any act altering or amending the same, shall extend or relate to or

affect the jurisdiction and practice of the sheriff's court in any action or proceeding to be commenced or carried on therein under the powers and provisions of this act."

The sections of that act corresponding with the 11th, 12th, and 13th of the 13 & 14 Vict. c. 61, are the 120th, 121st, and 122d. *This act had not passed at the time the action was commenced.*

*GRIZEWOOD v. BLANE. Nov. 20.

[*526

The declaration alleged a contract for the sale by B. to A. of railway shares at a certain price, and a subsequent contract for the sale by A. to B. of other railway shares at an advanced price, and an agreement that the two sets of shares should be set off against each other, and the differences paid by B. to A.:—Held, that a *general* plea of gaming, founded on the 18th section of the 8 & 9 Vict. c. 109, was bad, on special demurrer: it ought to have shown the circumstances relied on to bring the transaction within the act.

Quere, whether, in such a plea, the defendant should not negative the exception of lawful games, in s. 18?

A colourable contract for the sale and purchase of railway shares, where neither party intends to deliver or to accept the shares, but merely to pay "differences" according to the rise or fall of the market, is *gaming* within the 8 & 9 Vict. c. 109, s. 18.

THIS was an action of assumpsit. The declaration stated, that before the making of the agreement thereafter mentioned, to wit, on the 3d of August, 1850, the plaintiff, at the request of the defendant, bargained for and bought of the defendant, and the defendant then sold to the plaintiff, divers, to wit, four hundred and fifty shares in divers railway companies, which said companies had been and were then established and incorporated under and by divers acts of parliament, at and under certain prices in that behalf, that is to say, ten shares in a certain company called, to wit, "The Great Western Railway Company," at and for the price or sum of 58*l.* 15*s.* for each and every of such shares, and also one hundred shares in a certain other company called, to wit, "The North Staffordshire Railway Company," at and for the price or sum of 6*l.* 7*s.* 6*d.* for each and every of such shares, and also one hundred shares in a certain other company called, to wit, "The London and Brighton Railway Company," at and for the price or sum of 40*l.* for each and every of such shares, and also two hundred and forty old shares in "The London and South-Eastern Railway Company," at and for the price or sum of 15*l.* 5*s.* for each and every of such shares,—the *aggregate amount of the purchase-money of the said several shares in the said companies amounting to a large sum of money, to wit, the sum of 8885*l.*, and on the terms that all such several shares as aforesaid were to be delivered by the defendant to the plaintiff at a certain then future day and time, to wit, on the 13th of September then next following, and were to be then, and on such delivery as aforesaid, accepted and paid for by the plaintiff: that the defendant was not, at the time of the aforesaid bargain and sale of the said shares, possessed thereof, or of any of them, and, for the purpose of delivering the same to the plaintiff, must have purchased or otherwise acquired the same on

[*527

or before the said day appointed for their delivery as aforesaid: that, during the said interval between the said bargain and sale and the aforesaid day and time so appointed for delivery of the said shares as aforesaid, the said shares rose in value in the public market thereof, and greatly increased in price, and were afterwards, and within a very short time of the day so appointed in that behalf for the delivery thereof, to wit, within two days of such appointed future time, to wit, the 11th of September, 1850, publicly bought and sold in the market thereof, at the respective enhanced and increased prices thereafter mentioned,—by reason whereof the defendant would have been unable to acquire the said shares by purchase thereof in the public market thereof, so as to deliver the same on the said future day so appointed in that behalf as aforesaid, except by purchasing the same in such public market as aforesaid, for delivery to the plaintiff, at such enhanced and increased prices, which the defendant then well knew: that thereupon, in consideration of the premises, after such bargain and sale as aforesaid, and whilst the aforesaid contract in that behalf was open and incompletely perfected as aforesaid by the defendant, and before any breach of the said contract on either side, and before the said day so appointed *for the delivery of the said shares as aforesaid, and
*528] before any delivery of any or either of them by the defendant to the plaintiff, and whilst the said shares bore in the market such increased and higher prices and value as aforesaid, to wit, on the 11th of September, 1850, it was agreed by and between the plaintiff and defendant, at the request of the defendant, that the plaintiff should not call upon or require the defendant, or in any way should hold him liable, to deliver the said shares, or any of them, to the plaintiff, on the said future day so appointed as aforesaid in that behalf; and that the defendant should not call upon or require the plaintiff, or in any way hold him liable, at any time, to pay, for the same, to the defendant, the aforesaid purchase-money, or any part thereof, and that the aforesaid contract of bargain and sale of the said shares should be wholly rescinded, annulled, and made void as between the plaintiff and the defendant, so far as related to the said delivery of the said shares; and that, instead thereof, the plaintiff should sell to the defendant, and the defendant buy of and from the plaintiff, an equivalent number of the said several shares in the said several companies aforesaid respectively, at the then market price of such shares as were contained in the said contract of bargain and sale as aforesaid,—such market prices then being the increased and enhanced prices thereafter mentioned, that is to say, the said ten shares in “The Great Western Railway Company” at 67*l.*, the said one hundred shares in “The London and Brighton Railway Company” at 42*l.*, and the said two hundred and forty shares in “The London and South-Eastern Railway Company” at 18*l.* 7*s.* 6*d.*, the aggregate amount of such enhanced and increased

prices of the said several shares being and amounting to the sum of 9992l. 10s.,—such last-mentioned sum of money being a much larger sum than the first-mentioned purchase-money and prices thereof; and *that the defendant should pay to the plaintiff the difference [*529 between the two aforesaid amounts of the purchase-money of the said several sets of shares, such difference being and amounting to a certain sum of money, to wit, the sum of 1107l. 10s., within a reasonable time in that behalf after the making and entering into the last-mentioned agreement; and that neither of the said shares, nor any of them, in the said first-mentioned contract specified, should be actually delivered by the defendant to the plaintiff, nor the said shares, nor any of them, in the last-mentioned contract specified, should be actually delivered by the plaintiff to the defendant; but that the said two sets of shares should be set off against each other, so far as related to the actual delivery thereof respectively, by the respective parties to the said contract: that thereupon, afterwards, to wit, on the same 11th of September, 1850, in consideration of the premises, and that the plaintiff, at the request of the defendant, then promised the defendant to perform and fulfil the last-mentioned agreement on his part and behalf, the defendant then promised the plaintiff to perform and fulfil the same on his part and behalf, and to pay to the plaintiff the said difference of 1107l. 10s. as aforesaid: that, although the plaintiff, confiding in the said promise of the defendant, in compliance with the said agreement, did not at any time afterwards call upon or require the defendant to deliver to the plaintiff the said shares in the said contract firstly above mentioned, or any of them, nor had the plaintiff since held, nor did he hold the defendant liable to deliver the same, or any of them, to the plaintiff on the said future day so appointed in that behalf as aforesaid, or at any other time; and although the first-mentioned contract of bargain and sale, so far as related to the delivery of the said shares on the said future day, and the payment of the price thereof, was then and is wholly rescinded, *annulled, and made void, as between the plaintiff and the defendant, as far as related to the said delivery [*530 of the said first-mentioned shares; and although, instead thereof, the plaintiff did afterwards, to wit, on the 11th of September, 1850, in further compliance with the said last-mentioned agreement, sell to the defendant the said several shares lastly above mentioned, and the defendant then bought the same of and from the plaintiff at such last-mentioned and enhanced and increased market prices as aforesaid, and on the terms aforesaid; and although the plaintiff in all respects had always performed and fulfilled the said last-mentioned agreement in all things on his part and behalf to be performed and fulfilled; and although a reasonable time in that behalf for the payment of the aforesaid difference between the two aforesaid amounts of the purchase-moneys of the said several sets of shares,—such difference amounting, to

wit, to the said sum of 1107*l.* 10*s.*,—had elapsed before the commencement of this suit; and although the plaintiff had always from the making and entering into the said last-mentioned agreement been ready and willing to accept such difference and to close and finally settle the aforesaid transaction and dealing in the said shares as aforesaid,—whereof the defendant during all the time aforesaid had notice: yet that the defendant did not nor would pay to the plaintiff the said difference, &c., &c.

There was also an indebitatus count for the price of shares bargained and sold, shares sold and delivered, money paid, money had and received, and money due upon an account stated.

Second plea, to the first count, that the alleged contract was and is a contract made by and between the plaintiff and the defendant by way of gaming, contrary to the form of the statute then and still in force in such case made and provided, and that it was made after the year 1847,—verification.

*531] *Fourth plea, to the first count, that the alleged contract was and is a contract by way of gaming, contrary to the statute, &c.,—verification.

Seventh plea, to the first count, that the alleged selling by the plaintiff to the defendant of the said shares, and the buying of them by the defendant, was a contract by way of gaming, contrary to the statute, &c.,—verification.

Eighth plea, to the last count, that the shares and interest therein mentioned were respectively bargained and sold, and sold and delivered, and the said money was paid and had and received, and the said account stated, by way of gaming and wagering, contrary to the statute, &c.,—verification.

To each of these pleas the plaintiff demurred specially.

Pearson, in support of the demurrers.—The declaration is good, and the pleas bad. Two contracts are mentioned in the declaration, quite distinct and independent of each other: it discloses nothing illegal. A contract for the sale of goods to be delivered at a future day, is not invalidated by the circumstance that, at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them otherwise than by purchasing them after the making of the contract: *Hibblewhite v. M'Morine*, 5 M. & W. 462.† Neither is this a contract which upon the face of it relates to a gambling transaction. The dealing is in shares, and not in the British funds: and such a dealing has been held not to be within the stock-jobbing act, 7 G. 2, c. 8; *Wells v. Porter*, 3 Scott, 141, 2 N. C. 722; *Oakley v. Rigby*, 3 Scott, 194, 2 N. C. 732. *On the part of the defendant, it will be said that

*532] the pleas bring the case within the 18th section of the 8 & 9

Vict. c. 109, which enacts "that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." The pleas follow the words of the statute, but in so doing essentially violate the rules of pleading. This is well illustrated by the cases on the usury laws. In *Hill v. Montagu*, 2 M. & Selw. 377, a general plea of usury was held ill on special demurrer. "The corrupt contract," says Lord ELLENBOROUGH, "ought to be particularly set forth, and the usurious interest, that the party may know what to answer. The party against whom it is pleaded may be aware of the contract, but he cannot know in what particulars it is meant to be assailed, or wherein the other side imputes vice to it." So, here, the gaming contract ought to have been particularly set out. See the authorities, as to usury, set out in the notes to *Ferrall v. Shaen*, 1 Wms. Saund. 295 a, 295 b. Illegality of consideration, by the rules of pleading of Hilary Term, 4 W. 4, must be specially pleaded. Would it be enough to say that the contract declared on is void for illegality, without condescending upon the particular sort of illegality intended to be complained of? [JERVIS, C. J.—Those rules have nothing to do *with this question: they require certain defences to be pleaded [*533 specially, but they do not define the proper mode of special pleading.] Gaming has always been pleaded with particularity: *Allport v. Nutt*, 1 C. B. 974 (E. C. L. R. vol. 50). In *Cooke v. Stratford*, 13 M. & W. 379,† where the plea alleged a loss by gaming and playing at *vingt-un*, and a further loss by gaming and playing at hazard, and that the acceptance declared on was given in respect of those losses, the evidence failing as to the loss at *vingt-un*, the plea was allowed to be amended by limiting it to hazard,—an amendment which would have been wholly unnecessary if a general plea like these would suffice [MAULE, J.—That was under the statute of 9 Ann. c. 14, which names the game.] *Temple v. Keiley*, 1 M. & G. 904 (E. C. L. R. vol. 39), 2 Scott, N. R. 167, was also a case of very special pleas. [MAULE, J.—That also was under the statute of Anne.] In *Slegg v. Phillips*, 4 Ad & E. 852 (E. C. L. R. vol. 31), 6 N. & M. 360 (E. C. L. R. vol. 36), there was a special plea of illegality by statute 7 G. 2, c. 8. So, in a plea to an action for arresting the plaintiff on a charge of felony, all the circumstances to justify the suspicion of felony, must be distinctly stated; and it is not sufficient to allege, in general terms, that the

defendant suspected the plaintiff to have been guilty of felony. In *Ransford v. Copeland*, 6 Ad. & E. 482 (E. C. L. R. vol. 33), 1 N. & P. 671 (E. C. L. R. vol. 36), where the plaintiff declared as one of the public and registered officers of "certain persons united in copartnership, carrying on the trade or business of bankers in England, under the name of The Leamington Bank, according to the form and effect of the statute," &c., (a) the defendant pleaded "that the said persons united in copartnership, carrying on the trade or business of bankers in England, as in the declaration mentioned, at the time of the making *534] of the promises in the declaration mentioned, were and *consisted of more than six persons, to wit, one hundred persons, and that they were *illegally* associated together and carried on the trade or business aforesaid, with the view and for the purpose of borrowing and taking up, in England, money on their bills or notes, &c., during the continuance of the privilege granted by the 3 & 4 W. 4, c. 98, to the Bank of England:" and Lord DENMAN observed: "There is certainly great inconvenience in this general use of the word '*illegally*,' because, if it is considered as involving some fact which is to be the subject of proof, the defendant may avail himself of any fact which would render the business illegal." So, here, under a plea in such general terms as these, the defendant might avail himself of any extrinsic fact to make the contract illegal: and the plaintiff could have no idea of what he is required to meet at the trial. It will probably be contended that the two contracts mentioned in the declaration were in truth contemporaneous; and that the transaction amounted to gambling,—a mere bet on the future price of shares. But it is impossible to gather with any reasonable certainty, from these pleas, that that is the defence intended to be set up. [MAULE, J.—How would *you* plead it?] By stating that the two contracts were simultaneous, and then going on to show the nature of the illegality complained of. [MAULE, J.—Would that be consistent with the contract mentioned in the declaration?] Every plea of illegality of consideration must in some sense be inconsistent with the contract declared on. [MAULE, J.—I cannot assent to that.] A plea may always introduce an additional term as part of the contract, which is relied on as showing its illegality. [WILLIAMS, J.—You would liken it to a plea under the tippling act, 24 G. 2, c. 40, s. 12?] Precisely so. Certain lawful games and pastimes are excepted in s. 18 of the 8 & 9 Vict. c. 109; and, as this exception is contained *535] in the enacting clause, and does *not come by way of proviso in a subsequent clause, the defendant should have negatived it in his pleas: *Thibault v. Gibson*, 12 M. & W. 88.† The pleas do not allege that the contract declared on was *illegal*, but that it was a contract by way of gaming. Apart from the other objections, that might afford a defence, if *gaming* were illegal: but the statutes merely avoid

(a) 7 G. 4, c. 46.

the contract. Money won, and *paid*, cannot be recovered back. [JERVIS, C. J.—That case is not within the mischief, which is, playing on ticket or credit.]

Bovill, contra.—The plaintiff could have no difficulty in replying to these pleas. The declaration is very peculiarly framed: it first states that the plaintiff agreed to buy and the defendant to sell at a certain price; and then it sets out the contract in terms. According to the rules of pleading, illegality of consideration must be pleaded specially. It must be pleaded in confession and avoidance; and the pleader must take care that his plea does not amount to non assumpsit; he must give colour. The pleas here assume the contract to be in the form alleged in the declaration, and they avoid it by alleging illegality of consideration,—gaming. Upon the face of the declaration, it is alleged that the shares were not to be delivered, but the differences only paid. [JERVIS, C. J.—Should you not have negatived the exception in the 8 & 9 Vict. c. 109, s. 18? MAULE, J.—How is it *gaming*? If you show that there was no real sale of the shares, you will succeed without the aid of these pleas.] If the defendant could have been sure of that, he would not have pleaded them. In pleading a defence founded upon the usury acts, it is necessary to set out the contract, because the statutes in terms avoid the contract. That was the case of *Hill v. Montagu*, 2 M. & Selw. 377. [MAULE, J.—The difficulty is, that your special plea *would amount to non assumpsit.] *Hill v. Montagu* only decides [*536 that you must state the *contract*. Here the contract is set out: and the question is whether it is not a gaming contract. The 9 Ann. c. 14, s. 1, specifies the games: it enacts that all notes, bills, bonds, &c., where the whole or any part of the consideration shall be for any money, or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, &c., shall be utterly void, frustrate, and of none effect. From the nature of the thing, particularity there is essential. The same remark applies to the 16 Car. 2, c. 7. The second plea in *Oakley v. Rigby*, 3 Scott, 194, 2 N. C. 732, was general. [WILLIAMS, J.—If your argument is tenable, this sort of plea would be an equally good plea to a common indebitatus count. MAULE, J.—If, at the time the alleged contract was entered into, there was an understanding between the parties that the shares should not be delivered, then there was no such contract as that declared upon. The great probability, judging from this demurrer, is, that there was no such contract. WILLIAMS, J.—I do not differ from my Brother MAULE; but I do not think it necessary to decide that, in order to dispose of these pleas. JERVIS, C. J.—The plea is bad, unless you show the circumstances which make the contract declared on a gaming contract. MAULE, J.—What do you say to the exception in s. 18?] In *Wells v. Iggulden*, 3 B. & C. 186,

189 (E. C. L. R. vol. 10), BAYLEY J., says, "Statutes are not divided into sections upon the rolls of parliament,(a) and therefore the mere placing of the proviso in the same section of the printed act, does not make it necessary to notice it in pleading, unless it is also incorporated *537] in the enacting sentence." And PARKE, *B., says in substance the same in *Thibault v. Gibson*, 12 M. & W. 95.† The language of the latter part of s. 18 imports that it is a proviso, and not a qualification or exception out of the enactment. The pleas follow the terms of the statute, and are made specific and certain by reference to the contract stated in the declaration.

Pearson, in reply, was stopped by the court.

JERVIS, C. J.—As I understand these pleas, they amount in substance to this,—the defendant says, I do not mean to deny the contract alleged in the declaration; it may mean one thing or another; it may and does mean gaming. That is putting a construction upon the declaration which the defendant admits it does not expressly import. If the defendant meant to infuse gaming as an ingredient in the contract, in addition to what appears upon the face of the declaration, he should have gone on to show what were the circumstances which made it a gaming contract, so that the plaintiff might have an opportunity of traversing the alleged illegality. There can be no substantial difference between a plea to a special count like this, and a plea to a common indebitatus count. I think the plaintiff is entitled to judgment.

MAULE, J.—I think the contract as stated in the declaration is not a gaming contract, and therefore the allegation in these pleas, that the contract was by way of gaming, contrary to the statute, is contradictory to what appears upon the record. It is possible, nevertheless, that a gaming defence may arise. Upon general principles of pleading, however, it is not sufficient to follow the words of the statute. This is the same objection as arises upon any pleading for excessive generality. The *538] illegality complained of should not be stated by way of *simple inexplicit allegation, but it should be an allegation of facts which will enable the court to see whether or not the transaction is within the prohibition of the statute.

WILLIAMS, J.—I am of the same opinion. We cannot hold these pleas to be good, without violating one of the most important rules of pleading, viz. that the party pleading ought to let his adversary know what is to be the point in dispute between them at the trial. Mr. *Borill* says that the object of these pleas was to show that the contract stated in the declaration was not a real contract, but a mere colour for gaming. It is open to him, if he desires it, upon these pleadings, to take the opinion of a court of error upon the decision of the Exchequer in *Hibblewhite v. M'Morine*.

TALFOURD, J.—I also think that these pleas are bad for vicious gene-

(a) Vide ante, p. 466, n. (a).

ality. If the facts will establish the defence suggested, the defendant should have expanded them on the face of his pleas.

Judgment for the plaintiff.

April 19, 1852.—The issues of fact, upon,—first, non assumpsit,—secondly, a traverse of the bargain alleged in the declaration,—thirdly, that the contract was by way of wagering on the price of the shares, and was merely colourable, and that it was never intended that the said shares should be bought and sold, but was a mere wager, and that the contract was entered into after the year 1847,—went down for trial before JERVIS, C. J., at the sittings in London after Hilary Term, 1852.

*It appeared, that the plaintiff was a stock and share jobber in London; that the defendant, Colonel Blane, had, through his broker, contracted to sell and to re-purchase the shares in the declaration mentioned; and that there had been former dealings between the parties, of the same character, no shares passing, but merely settlements of differences, according to the usual course of speculators upon the Stock-Exchange. [*539]

It was objected, on the part of the defendant, that, it being evident that the sales were a mere colour for the payment and receipt of differences one way or the other, the contract was a gambling contract, within the 18th section of the 8 & 9 Vict. c. 109.

The Lord Chief Justice left it to the jury to say what was the plaintiff's intention, and what was the defendant's intention, at the time of making the contracts,—whether either party really meant to purchase or to sell the shares in question; telling them, that, if they did not, the contract was in his opinion a gambling transaction, and void.

The jury returned a verdict for the defendant.

Byles, Serjt., now moved for a new trial, on the grounds of misdirection, and that the verdict was against evidence.—Dealings in railway shares stand clear of any objection arising out of the stock-jobbing act, 7 G. 2, c. 8: *Hewitt v. Price*, 4 M. & G. 355 (E. C. L. R. vol. 43). The case, therefore, rests upon the 8 & 9 Vict. c. 109, s 18.(a) The transaction clearly is not within that act, merely because it relates to railway shares, any more than if it related to wheat or any other article of commerce or manufacture. It was distinctly held, in *Hibblewhite v. M'Morine*, 5 M. & W. 462,† that a contract for the sale of goods to be delivered at a future day, is not invalidated by the circumstance, that, at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them [*540] by the time appointed for delivering them, otherwise than by purchasing

(a) Ante, p. 532.

them after the making of the contract. [CRESSWELL, J.—That may be so. But the question here is, whether there was any contract of sale at all, and whether the transaction was not a mere bet upon the future price of the commodity.] Assume that the parties really meant, the one not to take and the other not to deliver the shares, each being ignorant of the other's intention, that clearly would not be gambling. [JERVIS, C. J.—Couple that with the custom of a long series of years. The jury thought it was quite manifest what the parties meant. No doubt it was a gambling transaction. CRESSWELL, J.—Each meant to break the contract, but to give the other a remedy against him for the difference of price, according as the market value might rise or fall. Did the plaintiff know that he was making a bargain which was not to be carried into effect? Would it not have been satisfied by the payment of the difference by the one to the other?] That is not the true test. The contract was, upon the face of it, a contract of sale. Is it competent to the vendee to set up his own fraud, and say that *he* never intended to fulfil the contract, and that the vendor never intended to fulfil it? [CRESSWELL, J.—And that that was the avowed intention of both at the time of entering into it?] The jury should have been asked whether, at the time of the first contract, Grizewood knew that this was a “time bargain,”—whether Grizewood knew what Blane's intentions were, and whether Blane knew what Grizewood's intentions were. There must have been a mutual interchange of intentions. That was not either in terms or in substance presented to the jury at all.

*541] *CRESSWELL, J.—I am of opinion that the direction of my Lord Chief Justice to the jury in this case was perfectly right. The contest at the trial was, whether Colonel Blane had entered into a contract with Mr. Grizewood for the purchase and sale of shares,—a *bonâ fide* contract which each at the time meant to perform. The jury were told, that, if neither party intended to buy or to sell, it was no bargain, but a mere gambling transaction. I think that was the true question to leave to them. As to the evidence, I think it abundantly warranted the jury in coming to the conclusion that there was no real contract of sale, but that the whole thing was to be settled by the payment of differences. It clearly was a gaming transaction within the meaning of the statute.

WILLIAMS, J.—I am of the same opinion. There was ample evidence of a mutual understanding between the plaintiff and defendant, that the contract of sale was colourable only: and, if so, the transaction was avoided by the 8 & 9 Vict. c. 109, s. 18. I also think the question was properly left.

TALFOURD, J., concurred.

JERVIS, C. J.—I thought the evidence abundantly justified the conclusion the jury came to. I certainly meant to ask the jury what was the intention of the parties, as understood by both of them, at the time

of entering into the contract. That was the whole contest throughout the trial. The transaction was clearly gambling, and a practice which every one must condemn. Rule refused.

*HARRISON and Others v. THE GREAT NORTHERN RAILWAY COMPANY. May 6. [*542]

The court will not, unless by consent, enlarge the time for moving in arrest of judgment, or for judgment *non obstante veredicto*, until after the determination of issues of law.

THIS was an action of covenant, to which the defendants had pleaded several pleas, to two of which the plaintiffs had demurred, but the demurrers had not yet been argued.

At the trial before JERVIS, C. J., at the last Assizes for Surrey, the defendants had a verdict upon two of the issues of fact, and the plaintiffs upon other issues.

Sir *F. Thesiger*, for the defendants, now prayed that leave might be reserved to him to move in arrest of judgment after the court should have pronounced judgment on the demurrers. He stated that *Bramwell* was instructed, on the part of the plaintiffs, to move for judgment *non obstante veredicto* on the issues found for the defendants; but it was conceived that neither motion could be made until the issues in law were disposed of,—*Goodright v. Hodgson*, Andr. 282.

JERVIS, C. J.—The rule of Hilary Term, 2 W. 4, r. 65, expressly provides that “no motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial.”(a) You can only have a rule by consent,—that the plaintiffs be at liberty to move for judgment *non obstante veredicto*, and the defendants in arrest of *judgment, within four days next after [*543] the determination of the demurrers.

The rule was drawn up accordingly.(b)

(a) See No. 50 of the Rules of Practice of Michaelmas Term, 1852.

(b) The court gave judgment for the plaintiffs on the demurrers in Hilary Term, 1852; and on a subsequent day in the same term, *Bramwell*, for the plaintiffs, obtained a rule nisi for judgment *non obstante veredicto* as to one of the pleas,—which was afterwards (Feb. 5, 1852) made absolute.

PRICE and Others v. THOMAS. Nov. 25.

Service of a rule upon "a female servant at the lodgings of the defendant," is not good service. An expired rule cannot be enlarged.

WORDSWORTH, on a former day, obtained a rule to show cause why the plaintiffs should not be allowed their costs, in an action upon a judgment, under the 43 G. 3, c. 46, s. 4. He now moved to make the rule absolute, no cause being shown, upon an affidavit of service thereof, by leaving the same with "a female servant at the lodgings of the defendant."

PER CURIAM.—That is no service.

Wordsworth then prayed that the rule might be enlarged, to show cause at chambers.

MAULE, J.—You cannot enlarge an expired rule. You may move for a fresh rule upon the same affidavits, or apply by summons at chambers. Rule dropped.

*544] *Ex parte WILLAND. Nov. 7.

An attachment for disobedience of a judge's order cannot issue against two partners, unless each has been served with the order.

An order having been made directing an attorney to deliver up certain deeds to a client,—the court granted an attachment against him, for refusing to deliver them up unless the client would pay him for a schedule thereof, to be kept by the attorney.

CROMPTON, on a former day, moved for an attachment against two attorneys of this court, carrying on business in partnership, for not delivering up certain deeds and papers pursuant to an order made by MAULE, J., on the 10th of July last. The affidavit showed a service of the order upon one of the partners only, and a refusal to deliver up the deeds and papers unless the applicant would pay him for making out a schedule to be retained by himself.

JERVIS, C. J.—Take a rule against the partner whom you have served, but not against both.

Phipson now showed cause.—The attorney has been guilty of no contempt. It was only reasonable that a schedule should be made, for his protection; and it was but just that the client should pay for it.

MAULE, J.—It was no doubt a very discreet thing for the attorney to require a schedule. But as it was solely required for his own protection, I think he ought to bear the expense of it. The attachment must go, but it may lie a reasonable time in the office, and the attorney must pay the costs of it. Rule accordingly.

***PARKER v. THE GREAT WESTERN RAILWAY COMPANY. Nov. 14.** [*545]

1. By the 163d section of the act of incorporation (5 & 6 W. 4, c. cvii.) of the Great Western Railway Company, it was provided that all persons should have free liberty to use the railway, with carriages properly constructed, upon payment of such rates and tolls as the company should demand, not exceeding the rates or tolls by that act authorized. The 164th section empowered the company to demand and receive for the tonnage of goods conveyed upon the railway certain rates or tolls,—the highest rate being 3d. per ton per mile. The 166th section authorized the company to provide locomotive or other power for drawing goods, &c., upon the railway, and to receive for the use of such engines or other power such sums as they should think proper, in addition to the rates or tolls authorized to be taken by the act. The 167th section empowered the company to employ engines and carriages for the conveyance of goods, &c., on the railway, and to make such reasonable charges for such conveyance as they might determine upon, in addition to the rates or tolls authorized by the act. And by the 1 Vict. c. xcii., s. 44, the company were empowered to demand and receive a reasonable charge “for the loading, unloading, or weighing any articles, matters, or things *which they might be required to load, unload, or weigh*.”—

Held, that the last-mentioned provision did not apply where the company, as carriers, undertook the conveyance of goods of other persons, but only where the duty of loading, unloading, &c., was performed by them at the request of persons supplying their own trucks; and, consequently, that they were not entitled to make a charge for “loading, unloading, &c.,” in addition to the rates charged for carriage, where they acted as carriers under the 5 & 6 W. 4, c. cvii. s. 167; and that a party intrusting goods to them to be carried, and paying this charge in order to obtain the carriage and delivery of them, might recover back the amount in an action for money had and received.

2. By the 175th section of the 5 & 6 W. 4, c. cvii., it was enacted that the rates and tolls should be charged *equally* and after the same rate per ton per mile in respect of the same articles, and that no reduction or advance in the said rates and tolls should, either directly or indirectly, be made partially or in favour of or against any particular person or company, &c.; but that every such reduction or advance upon any particular kind or description of articles should take place throughout the whole of the railway upon and in respect of the same description of articles, and should extend to all persons using the same or carrying the same description of articles.

By the 50th section of the 7 & 8 Vict. c. iii., the company were empowered, whenever they should act as carriers, or should provide locomotive or steam power or carriages for the conveyance of passengers, goods, &c., to charge for such locomotive or steam power and carriages such sum (not exceeding the sums limited by former acts), and that either per ton or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, as they should think expedient: provided, that, in whatever way the charges were made, they should be made *equally* to all passengers and to all persons in respect of all goods, &c., and *things of a like description and quality*, and conveyed in or propelled by a like carriage or engine passing only over the same portion of, and over the same distance along, the railway, and *under the like circumstances*; and that no reduction or advance in any of such charges should be made partially, either directly or indirectly, in favour of or against any particular company or person.

The company required carriers who brought goods to them for conveyance on the railway, to deliver with them a printed note filled up with the description, contents, and weight of the several packages to be carried, *without which the company refused to receive them*. In consideration of this additional trouble, the company formerly allowed the carriers a discount of 10 per cent. on the sums paid by them for carriage:—

Held, that the discontinuance of this allowance did not constitute an inequality of charge, as between carriers and the rest of the public, so as to give the carrier a claim for money had and received,—whatever other remedy he might have against the company.

3. The company had entered into an agreement with one Sherman, a carrier, to collect and deliver parcels for them in London, for which service they paid him 1000*l.* per annum, he on his part relinquishing the customary carrier's charge for “booking:”—Held, that this did not constitute an inequality of charge, within the 5 & 6 W. 4, c. cvii. s. 175.

4. By the 171st section of the 5 & 6 W. 4, c. cvii., the company were empowered to fix the sum to be charged by them in respect of small parcels (not exceeding 500*lbs.* weight) as to them should seem proper: provided always “that that provision should not extend to articles sent

in *large aggregate quantities*, although made up of separate and distinct parcels, such as, bags of sugar, coffee, meal, and the like, but only to *single parcels unconnected with parcels of a like nature*, which might be sent upon the railway at the same time."

The company had, during the period embraced by this action, issued three printed bills of charges, called "scale-bills," the first and third of which contained four, and the second five classifications of goods,—and at the end an intimation that "packed parcels" would be charged by the company 50 per cent. in addition to the highest class, that is, the fourth class in the first and third, and the fifth class in the second scale-bill. This additional charge of 50 per cent. was imposed upon the plaintiff and other carriers only, and not upon the public:—

Held, a violation of the equality clauses,—5 & 6 W. 4, c. cvii., s. 175, and 7 & 8 Vict. c. iii., s. 50; and that the plaintiff was entitled to recover back the overcharge.

5. According to the company's scale-bills, all packages of *less* than a given weight were to be charged, in their respective class, according to the "parcel-rate," and all *above* that weight, in their respective class, according to the "tonnage-rate." The company did not treat carriers as consignor and consignee of the goods carried for them, for the purpose of calculating the charge to be made for their carriage; but they adopted the following system:—When several packages of goods of *different descriptions*, but of *one class*, appeared to be intended for the same ultimate consignee, all such goods were lumped together, and charged at one gross weight, so as to bring them into the "tonnage-rate," although severally the packages might be of such weight as would have brought them into the "parcel-rate;" but, if such goods, though in the same class, were not intended for the same ultimate consignee, each package or number of packages going to each ultimate consignee was charged separately, and according to the "tonnage" or "parcel-rate," according as the weight was above or below the dividing point between the one rate and the other:—

Held, that this was an inequality of charge, within the 5 & 6 W. 4, c. cvii. s. 171; and that the fact of the plaintiff's being a carrier, and not the ultimate consignee of the goods, did not show that the goods were not carried "under the same circumstances," within the meaning of the proviso in the 7 & 8 Vict. c. iii., s. 50.

6. By the first scale-bill, the company intimated, that, on "miscellaneous goods, not being aggregate of one *kind* or *class*," an additional charge of 2d. per package or article, up to 2 cwt., would be made. On some occasions, when packages sent by the plaintiff, in manner before mentioned, contained goods of one *class*, and each package was of a weight less than the limited weight for the "parcel-rate," and was intended for a different ultimate consignee, but the several packages together exceeded the limit, the company charged them as "miscellaneous goods," on which, in addition to the higher rate of charge, this further charge of 2d. per package was imposed:—

Held, that the words "kind" and "class" being used synonymously, this additional charge was, under the circumstances, unjustifiable.

7. Assuming (as the arbitrator by whom the case was stated, had found) that the company were entitled, under the 50th section of the 7 & 8 Vict. c. iii.,—in addition to the rate of 3d. per ton per mile which they are authorized to charge by the 5 & 6 W. 4, c. cvii., s. 164,—to charge for locomotive or steam power, and for carriages, such sum as they think expedient:—Held, that the company are not bound in their charge specifically to demand so much per ton under the 5 & 6 W. 4, c. cvii., s. 164, and so much per mile for the use of the locomotive power and carriages under the 7 & 8 Vict. c. iii. s. 50; but that they are entitled to charge, as carriers, for the conveyance (including loading, unloading, &c.) of the goods, under the 5 & 6 W. 4, c. cvii. s. 167, a *reasonable sum* beyond such tonnage and mileage

8. Where the carrier has collected from several original consignors several parcels intended for several ultimate consignees, the whole of which together do not in weight exceed the dividing point between "parcel" and "tonnage" rates, according to the scale-bill, and do not amount to 500lbs. in weight, and has delivered them to, and received them from, the company in one lot,—Held, that, if the nature of the parcels be such that the company are entitled to charge them to the public at the "parcel-rate," under the 171st section of the 5 & 6 W. 4, c. cvii., the fact of the contents being goods of the same "class" in the scale-bill, for a different purpose, does not disentitle the company so to charge them to the carrier.

By an order of nisi prius made in this cause on the 9th of February, 1849, a verdict was taken for the plaintiff, by consent, damages 500l., costs 40s., subject *to the award of a barrister, who was thereby
*546] empowered to direct that a verdict should be entered for the

plaintiff or the defendants, as he should think proper, and to whom the cause and all matters in dispute between the parties relative to the charges made by the defendants *upon the plaintiff, and to payments made by the plaintiff to the defendants, were thereby [*547 referred; and it was, amongst other things, ordered that the arbitrator should state the facts upon his award, which should be brought before the Court of Common Pleas on a special case, with the view of the opinion of the court being taken thereon upon the right of the defendants to enforce the payments which the plaintiff had made in respect of the items mentioned in the several books which accompanied the notice of action, and of such other items whereof the plaintiff might give notice in writing to the defendants or their attorneys, and also upon the right of the plaintiff to recover in the action in respect of such items as aforesaid, and upon any other question between the parties which either party might require to be raised, by notice in *writing to the arbitrator, [*548 so that the same should not apply to any matters that occurred before the 10th of January, 1848; and it was further ordered that the special case should be brought before the court in the usual way, and that, after the court should have given judgment thereon, the case should be referred back to the arbitrator, if required by either party, and that he should assess and award what, if anything, might be due to the plaintiff, upon the principles laid down in the judgment of the court, and apply the same to all payments which might have been made by the plaintiff to the defendants up to the time of such judgment, or to the final award of the arbitrator, if the case should be referred back to him after such judgment of the court,—the costs of the suit, reference, and award, to abide the event of the award; and it was further ordered, that in the event of any defect or omission in the special case, or of either of the parties disputing the validity of the award, or moving to set the same aside, the court should have power to remit the special case, or the matters thereby referred, any or either of them, to the reconsideration or amendment of the arbitrator.

The arbitrator, by his award,—reciting the order of reference, and further reciting that it had been agreed by the parties, that, in the event of its becoming necessary to have the accounts between the parties taken under the submission, the same should be referred to an arbitrator other than the arbitrator named in the order, to be nominated by the parties for that purpose,—stated the following facts for the opinion of the court:—

The action mentioned in the order is an action on promises, commenced by Parker against The Great Western Railway Company on the 23d of October, 1848. The declaration was for money received by the defendants to the plaintiff's use. The defendants pleaded non assumpsit, whereupon issue was joined.

*549] *The particulars of demand stated that the action was brought to recover 215*l.* 10*s.* 11½*d.* for overcharges made by the defendants, and paid to them by the plaintiff, for the carriage of goods on the Great Western Railway and other railways connected therewith, between the 10th of January, 1848, and the 13th of September, 1848. The particulars of those overcharges were mentioned in a notice of action and three books referred to therein, which the plaintiff delivered to the defendants upwards of a calendar month before the commencement of the action, and which it was agreed were to be referred to.

Since the date of the order of reference, the plaintiff had given to the company a notice in writing of several other alleged items claimed and sought to be recovered by him from the company, for overcharges alleged to have been made by them, and paid by him, for the carriage of goods on the Great Western Railway, and the railways connected therewith, since the 10th of January, 1848.

The plaintiff, Parker, during the times hereinafter mentioned or referred to, was a common carrier, having his principal place of business at the New Inn Yard, Old Bailey, London, and was in the habit of carrying goods for hire between that place and various places in the west of England, employing for that purpose the Great Western Railway Company, as common carriers, to convey the goods on their railway for so much of the journey as might be convenient for him, and performing the rest of the journey, that is to say, to and from the company's stations, by his own agents. All the goods of the plaintiff mentioned in this case were delivered by the plaintiff or his agents to the company at one of their stations, before being carried by them, and, after being carried by them, were received by the plaintiff or his agents from them also at one of their stations. The said goods were *550] goods which the plaintiff was employed by *his various customers to carry in the way of his trade and business as a common carrier.

The defendants are the Great Western Railway Company mentioned in and incorporated by the statute 5 & 6 W. 4, c. cvii., for making the Great Western Railway; which act, and all other acts relating to the said company, were to be taken as part of the case; but the parties desired that the court should be particularly referred to the 5 & 6 W. 4, c. cvii., ss. 163, 164, 165, 166, 167, 171, 174, 175, and to the 1 Vict. c. xcii., ss. 43, 44, 2 Vict. c. xxvii., s. 24, and 7 Vict. c. iii., ss. 48, 49, 50.

For the purposes of this case, the provisions of the 10 & 11 Vict. c. ccxxvi., as to the reduced rates therein mentioned, were to be taken as not having come into operation.

The company completed their said lines of railway before any of the claims of the plaintiff arose, and from the time of such completion were common carriers thereon of passengers, goods, and cattle, from and to

the various stations from and to which the plaintiff sent goods during the time in which the alleged claims hereinafter mentioned arose, and during all such time have carried goods on their said railway, in the manner before mentioned, for other carriers by trade beside the plaintiff, and have also carried goods sent for carriage to the company, or their agents, by persons not carriers by trade, and have, by themselves or their agents, delivered such last-mentioned goods to the consignees at the places to which they were directed, making for such delivery charges in addition to the carriage charges.

The company have always found and conducted the carriages, trucks, and engines used on the railway, for the carriage of passengers and goods. The carriage of goods by the said railway has been found so much quicker, better, and cheaper, than carriage by the old common roads, that the individuals who act as common *carriers have for [*551 some years past found it necessary to their business to employ the company to carry for them on the said railways, whenever the intended journey of the goods could be performed wholly or partly by railway.

The company issued and circulated the printed scale-bills contained in an appendix to the case, and which were to be taken as part of the case, dated the 1st of January, 1848, marked A., 15th of June, 1848, marked B., and 17th of July, 1848, marked C.; and the same have been, until altered by a succeeding scale-bill, respectively acted upon by the company and by the carriers and other persons sending goods by the said railway, except as hereinafter appears in this case. The company have never charged the public or carriers specifically for the use of the railway, or for locomotive power, and have never been applied to to do so.

All goods to which reference is made throughout this case, were carried by the defendants more than six miles along their railway.

The plaintiff and the company have, for five years and more last past, been at variance on the subject of the charges made by the company for the carriage of the plaintiff's goods on their railways; the plaintiff having on many occasions during that time complained to the company that their charges to him were excessive and more than was lawful for them to take; and he has on various occasions during that time threatened them with legal proceedings to recover the supposed overcharges made by them and paid by him. The plaintiff's servants who from time to time paid, on his account, to the company's servants the company's charges for carriage hereinafter mentioned to have been paid by the plaintiff, were in the habit, at the time of paying, of protesting against the company's charges as excessive and illegal; and it was understood between the company's clerks (who received *the [*552 charges) and the plaintiff's servants (who paid them), that the latter always paid under protest against such charges; and such charges

were in fact always paid by the plaintiff unwillingly, and in order to have his goods carried or delivered; and the company refused to carry his goods, or to deliver them to him after they were carried, unless he would pay them; and he was under the necessity of employing the company to carry for him, on account of the superior cheapness and expedition of carriage by railway, or of losing his trade as a carrier. The plaintiff on all occasions mentioned in this case paid the company's charges for the carriage of his goods, in cash, to the company's receiving clerks, either before the goods were carried by the company from the station of departure where the company received them from the plaintiff, or before they were delivered by the company's servants to the plaintiff at the station of arrival.

I. The first claim of the plaintiff is, to recover back from the defendants the amount paid by the plaintiff to the defendants, under such circumstances as before mentioned, of certain charges, in addition to their carriage rates, made by the defendants from the 15th of June, 1848, to the 17th of July, 1848, for "loading, unloading, and risk of stowage," and from the 17th of July, 1848, to the 1st of May, 1851 (when the scale-bill was again altered), "for loading, unloading, and covering of goods."

By the 1 Vict. c. xcii., s. 44, the defendants are "empowered," from time to time and at all times hereafter "to demand, receive, and recover a reasonable charge for the loading and unloading or weighing any articles, matters, or things which they may be required to load, unload, or weigh;" and also to demand, receive, and recover "for the wharfage or warehousing and standing-room of all articles, matters, and things loaded, landed, or placed in or upon any of the wharfs, landing-places, stations, or warehouses of the said company," certain rates, *553] tolls, or *duties thereafter specified: and by the same section the company are entitled to make certain charges for the use of cranes.

No such charges as those in question were made until the before-mentioned date of the 15th of June, 1848, when the scale-bill of that date, before referred to, was published by the company. That scale-bill contains the following notification of charge:—"Notice. In addition to the parcel and tonnage rate, the company will make a charge, by parcel or weight, on every parcel or lot of goods, for the loading, unloading, and risk of stowage of the same; the particulars of which can be obtained at any of the railway stations. This applies to all but goods carried at mileage rates, as under."

That scale-bill continued in force, and was acted on, from the said 15th of June, 1848, until the 17th of July, 1848, when the bill of that date, already referred to, was published by the company; and such last-mentioned bill then came into and continued in force until an alteration, in the month of May, 1851. This last-mentioned bill con

tains the following notice:—"In addition to the parcel and tonnage rate, the company will make a charge, by parcel or weight, on every parcel or lot of goods, for the loading, unloading, and covering of the same; the particulars of which can be obtained at any of the railway stations. This applies to all but goods carried at mileage rates, as under."

The particulars of this additional charge were slightly varied from time to time: but it is sufficient, for the purposes of this case, to refer to the particulars issued under date the 17th of July, 1848,—a copy of which accompanied and was to be taken as part of the case.

According to a memorandum at the bottom of the said particulars, the additional charge on the enumerated articles, was, 2*d.* per hamper, basket, box, bundle, bag, bale, barrel, crate, butt, puncheon, hogshead, or other *package, up to 1 cwt., above which it was to be 2*d.* [*554 per cwt.; but in no case was more than 6*d.* to be charged for any one article: but, on quantities of goods not in packages, such as cheese, hides, &c., it was to be 2*d.* per cwt. on the total weight, and no fractional part was to be charged at less than 1 cwt.

The course of business has been, for the plaintiff's men to bring the goods which were to be carried on the railway, to the company's station, in wagons or vans of the plaintiff, and to deliver the goods to the servants of the company, on the platform, and for the company's servants to carry them across the platform, and load them on the trucks. In like manner, goods which had been carried by the company, were unloaded out of the trucks by their servants, carried by them across the platform, and then delivered to the plaintiff's servants, who loaded the same in his wagons or vans, and then took them away.

The goods were weighed by the plaintiff before they were brought to the station of the company, and, according to the general course, were not weighed by the company, though some occasionally were weighed, if any mistake was suspected, or by way of a check.

The company were not required by the plaintiff to load or unload or weigh the said goods. By the regulations of the company, the servants of the plaintiff and other carriers were not allowed to assist in carrying the goods across the platform to or from the trucks, or in loading or unloading them into or out of the trucks: but these regulations were not strictly enforced; and the carrier's servants who remained at the stations for the purpose of loading and unloading their own wagons, frequently assisted in loading and unloading the trucks, and carrying the goods across the platform, with the view of greater despatch of business; and without such assistance, great delay must have been occasionally *suffered, especially on particular [*555 occasions, and the arrival or despatch of particular trains.

The arbitrator found that the said additional charges were unreasonable, when considered with reference to various articles which had been

carried by the company for the plaintiff; as, for instance, boxes of fruit, or other article of merchandise, of which many would go to make up the cwt.; and that such additional charges were not unreasonable, when considered with reference to certain other articles or packages, of great weight: but, taking the same as average charges on all the goods loaded and unloaded by the company, he found the same to be greater than reasonable.

The questions for the opinion of the court on this head of claim, are,—First, whether the plaintiff is entitled to recover from the defendants the whole of the sums paid by him to them as aforesaid for the charges for loading and unloading and risk of stowage, or for loading, unloading, and covering: and, if not,—Secondly, whether he is entitled to recover any, and, if any, what part of such sums, or either of them, and, if so, on what principle the assessment and award of what is due to the plaintiff in respect of this head of claim is to be made, under that part of the rule of reference which directs that such assessment and award shall be made upon the principles laid down in the judgment of the court.

The second head of claim made by the plaintiff relates to an allowance of 10 per cent. on the moneys paid by him to the company for carriage under the circumstances before mentioned, in order to have his goods carried or delivered by the company, and claimed by him in respect of the performance by him of matters which the company require to be done by him and other carriers, and not by the rest of the public.

*556] For some years past, and during the whole time over *which the plaintiff's claim extends, the company have required the plaintiff and other carriers who brought goods to them for carriage on the railway, to fill up, sign, and deliver to the company's clerk, on every occasion of bringing such goods to the company, and before the goods were received for carriage, a printed form or declaration and ticking-off note,—one of which, filled up in the manner required by the company, was annexed to the case. In order to fill up these printed forms, as required, it is necessary for the carrier's servants to weigh and classify the goods before bringing them to the company's station.

During the whole time, from the 10th of January, 1848, to the present, the plaintiff, on every occasion when the company carried goods for him on the railway, was required to weigh and classify, and did by himself or his servants weigh and classify, and made and filled up and signed the declaration and ticking-off note, in the form aforesaid, and delivered the same to the company's clerks before the goods were carried: and, as the plaintiff, in the way of his trade as a carrier, had to collect parcels and goods in various parts of London, to be afterwards forwarded by the Great Western Railway, the plaintiff, in order to fill up the said form and declaration and ticking-off note, was generally

obliged, before taking such parcels and goods to the railway-station, to bring them to his place of business at the New Inn Yard, Old Bailey, in order there to weigh and classify the same, and fill up the said form. The company would not allow the plaintiff or the other carriers to weigh their goods at the company's station, and to fill up their declaration and ticking-off note there: and an intimation is inserted at the bottom of the ticking-off note, to the following effect:—"Carriers' goods not accompanied by this declaration and ticking-off note, *properly [*557 filled up and signed by the consignor, will not be received for transmission."

The forms of these declarations and ticking-off notes are furnished by the company to the carriers.

During the same period, when persons not carriers brought goods to the station to be carried by the company, they were required to make or sign a declaration; and the company, in the usual course of business, generally weighed the goods. The party bringing the goods was then required to fill up a form provided by the company (a copy of which was annexed to the case), and to sign the same: but, if he could not write, one of the company's servants filled in the necessary particulars, and the party bringing the goods signed his mark thereto.

The form of the carriers' ticking-off note was a convenient one both for the carriers and the company, as relates to the carriers' goods; and the carriers would require, for the purposes of their trade, to know and have entries of the particulars and weights of the goods sent.

The forms signed by the public in general when delivering goods for carriage, and the form sent by the carriers to the station, were kept by the company; and the carrier would, in the course of business, have to make out and send to the station where the goods were to be delivered by the company another copy of such document, for the purposes of his agent there.

The company, by requiring these matters to be done by the carriers, were relieved from some of the trouble and duties which they had to perform in the case of the goods of parties not carriers.

Before the year 1844, the company were in the habit of making an allowance to carriers, of 10 per cent. on the amount of the rates paid by them to the company for the carriage of parcel and tonnage goods; and, during the time such allowance was made, the carriers did the [*558 *same work as to weighing the goods, and filling up and furnishing the company with the declarations and ticking-off notes, as they have done since the 11th of January, 1843: and the carriers also before 1844 did considerable work in the loading and unloading of the goods into and out of the company's trucks. It was an object with the company, at the time of making this allowance, to attract the carriers to bring their goods upon the line of railway. This allowance has been entirely discontinued since the decision of the case of *Parker v. The Great*

Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott, N. R. 835, in this court. The work of loading and unloading done by the carriers since the 10th of January, 1848, was not required by the company to be done by the carriers, and was done by them for their own convenience, and contrary to the strict regulations of the company; but, as before stated, the carriers, without such work by their servants, would have sustained considerable delay on the arrival of particular trains, which delay would have been greatly to their prejudice, and to avoid which it was necessary for them to be allowed to give, and to give, such assistance as aforesaid.

If the carriers were entitled to any allowance on this head of claim, the arbitrator finds that an allowance of 10 per cent. on the rates paid by the carriers to the company was more than a reasonable allowance for the matters performed by the carriers.

The question for the opinion of the court on this head, is,—whether the plaintiff is entitled to the 10 per cent. claimed by him; and, if not, whether he is entitled to a reasonable allowance in respect of the weighing and making out and delivering to the company the declarations and ticking-off notes, and of the loading and unloading, or of any and which of them.

*559] The third claim of the plaintiff arises out of the *arrangement for the allowance of 1000*l.* a year by the company to Mr. Edward Sherman, as after mentioned.

The relations in business between Mr. Sherman and the defendants will appear from the two agreements between them dated the 12th of June, 1848,—copies of which were appended to the case. These agreements are continued by an agreement dated the 8th of June, 1850, and are still acted on.

Mr. Sherman, under the said agreements, and as agent for the company, receives and collects parcels in London, and delivers them to the defendants, at their station at Paddington, who carry them into the country, and there, by themselves or their agents, deliver the parcels to the consignees: and, in like manner, the company, having brought parcels from the country, hand them over to Mr. Sherman, who delivers them to the consignees in London. Mr. Sherman's duties are confined to such receipt and collection and delivery in London; and he has nothing to do with the carriage of the goods along the railway, or elsewhere than in London.

Previous to the date of the agreement of the 12th of June, 1850, Mr. Sherman received and collected goods for the company in the same manner as he has done under the said agreement; but, up to that time, he received for his own use, and without in any manner accounting for the same to the company, certain booking-fees in respect of each parcel, which in amount exceeded the sum of 1000*l.* a year. These booking-fees are agreed, by the first of the said agreements, to be relinquished,

and were not received by Mr. Sherman, or the company, since the day of the date of the said agreement: and the said sum of 1000*l.* a year was *bond fide* agreed to be paid by the defendants to Mr. Sherman in lieu of and in consideration for his relinquishing such fees; and Mr. Sherman has been and is employed by the defendants, for their [*560 convenience, as their agent and servant, for the convenience of their carrying trade as railway carriers.

The question for the opinion of the court, on this head, is,—whether the plaintiff is entitled to recover an allowance in respect of his having less advantage, or to his goods, than is afforded with respect to the goods received, collected, and delivered by Mr. Sherman as hereinbefore mentioned.

IV. The fourth head of claim relates to packages called “packed parcels” in the said scale-bills. By s. 171 of 5 & 6 W. 4, c. cvii., it is provided that the company may fix the sum to be charged in respect of small parcels not exceeding 500*lbs.* weight each, with a proviso that that provision should not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels, unconnected with parcels of a like nature, which may be sent upon the railway at the same time.

On the back of the scale-bill dated the 1st of January, 1848, at the end of the fourth class of the classification of goods, at the end of the fifth class on the bill of the 15th of June, 1848, and at the end of the fourth class on the bill of the 17th of July, 1848, will be found an intimation that packed parcels will be charged by the company 50 per cent. in addition to their weight in the highest class, that is to say, the fourth class in the bills of the 1st of January and the 17th of July, 1848, and the fifth class in the bill of the 15th of June, 1848.

Whilst these bills were respectively in force, the plaintiff sent to the company packages consisting of parcels packed together into one package, to be carried on the railway, and delivered to the plaintiff's agent after being so carried. The parcels contained in such package were collected or received by the plaintiff in the course of his trade as a carrier, from various *consignees, and were directed to, and were [*561 to be delivered by, the plaintiff's agent in the country, to various consignees; and each of such separate parcels sent by the plaintiff before the 15th of June, 1848, was under the weight of 3 cwt., though the package when packed was more than that weight: and each of such separate parcels sent by the plaintiff after the 15th of June, 1848, was under the weight of 1 cwt., though the package exceeded that weight. The company charged, and the plaintiff paid to the company, on each occasion, and under such circumstances of compulsion as hereinbefore mentioned, the carriage rate for such packed package, according to the gross weight of such packed package, as one entire package, in the

fourth or fifth class, according as it came under the one or the other of the said scale-bills in force at the time, together with the said extra and additional charge of 50 per cent. imposed on such package by the company, in consequence of its consisting of such packed parcels as aforesaid.

The practice of the company has been, to charge all carriers who send packages containing packed parcels on the same principle.

During the same period, persons in trade, not carriers, have been in the habit, when sending a parcel from London to a customer in the country, or *vice versa*, of enclosing in such parcel other parcels directed to other customers or friends in the town or place to which the parcel was being sent; and parties have in many cases desired several tradesmen or friends who might be sending them several parcels or lots of goods, to send all parcels or lot to one party, to be made up into one package, and sent in one package, by the railway of the defendants, to the party ordering the goods.

The general existence of this practice has been known to the defendants; but the defendants have not taken any measures to prevent such *562] a custom being *pursued, or to discover individual instances of it. The company have not interfered with this practice, or enforced the payment of the 50 per cent. charge in any case where the party making up or receiving the package of several parcels did not contemplate any pecuniary profit to himself, and where such matter occurred as a friendly accommodation by one party to the other: and they do not appear to have ever enforced the charge, except as against carriers. In such cases, the entire package has exceeded the 3 cwt. and 1 cwt. which was from time to time the limit of parcels under the said scale-bills: but the several parcels contained in such package have each fallen short of that weight.

The plaintiff claims to have the 50 per cent. extra charge which he paid on such packages of packed parcels over and above the charge on the single weight, refunded to him.

Under this head, the question for the opinion of the court is,—whether the plaintiff is entitled to recover the amount of the said extra charge of 50 per cent. so paid by him as aforesaid, or any and what portion thereof.

The fifth head of claim of the plaintiff arises from alleged overcharges by the defendants beyond the amounts which ought to have been charged by them for the carriage of the plaintiff's goods, according to the proper interpretation of the several modes of charge expressed in the said scale-bills.

The company charged the plaintiff for the carriage on their railway of packages up to 3 cwt., down to the 15th of June, 1848, and of packages up to 1 cwt. after that date, as parcels, upon the parcels-scale.

The several descriptions of goods carried, were divided into several

classes, according to the "classification of goods" which will be found on the back of each of the said scale-bills. These classifications will be found to differ on each of the said bills; the goods being [*563] *divided according to the bill dated the 1st of January, 1848, into five classes, the first of which is described as miscellaneous; and the bill of the 15th of June, 1848, making a division into five classes, without any general or miscellaneous class; and the bill of the 17th of July, 1848, only containing four divisions, and also being without any miscellaneous class.

According to the first of those scale-bills, all packages of less than 3 cwt. are to be charged in their respective class, according to the first table of charges, parcel-rate, and all above that weight in their respective class, according to the second table of charge, the tonnage-rate. According to the other two scale-bills, dated the 15th of June and 17th of July, 1848, the dividing point between the parcel and tonnage-rate is fixed at 1 cwt.

The plaintiff and all other carriers using the defendants' railway, collect from their customers in London, or the country, the original consignors, parcels, or packages of various weights, and containing goods of various classes, which are to be carried by the defendants, and delivered by them to the plaintiff's or other carriers' agents, who distribute them to the parties, the ultimate consignees, for whom they are intended.

The carriers deliver all the goods so collected by them to the defendants, in one lot or wagon-load, and receive them, in like manner, in one lot or wagon-load, after they have been carried by the defendants: but, as already mentioned, in reference to a previous head of claim, they deliver with the goods the declaration and ticking-off note, which, as appeared by reference to the specimen annexed to the case, gives the names of the ultimate consignees, as well as that of the carrier who sends and is to receive the goods.

The company do not treat the carrier as consignor and consignee of the goods, for the purpose of calculating the charges to be made for the carriage of the goods, *but adopt the following system in [*564] making out such charges:—

When several packages of goods of different descriptions, but of one class, appear to be intended for the same ultimate consignee, all such goods are lumped together, and charged at one gross weight, which would bring them into the tonnage-scale, although severally the packages might be of such a weight as would have brought them into the parcel-rate. But, if such goods, though in the same class, be not intended for the same ultimate consignee, each package or lot of packages going to each ultimate consignee is charged separately and according to the tonnage or parcel-rate, according as the weight is above or below the dividing point between the parcel and tonnage-rates. Thus, if ten

packages of $\frac{3}{4}$ cwt. each of goods of the same class be directed to an ultimate consignee, the whole would be charged at tonnage-rate on $7\frac{1}{2}$ cwt.: but, if such packages were directed to ten different ultimate consignees, each package would be charged at $\frac{3}{4}$ cwt., at the parcel-rate. The tonnage-rate being lower than the parcel-rate, a proportionate advantage is thus derived to the company.

The plaintiff contends that the company are entitled to charge him tonnage-rate only on the aggregate weight of all the packages containing goods of one class, whether such packages are intended for the same ultimate consignee or for several; and, on this head, the question for the court will be, whether the plaintiff is entitled to recover from the company the amount of such alleged overcharges.

The sixth head of claim arises on the scale-bill dated the 1st of January, 1848, which remained in force until the 15th of June, 1848.

On some occasions when packages sent by the plaintiff in manner before mentioned contained goods of one class, and each package was *565] of a weight less than 3 cwt., and *was intended for different ultimate consignees, but the several packages together exceeded 3 cwt., the company charged the same under the fifth class, as miscellaneous goods, on which, in addition to the higher rate of charge, a further sum of 2*d.* per package is charged, as mentioned under the heading fifth class on the back of the scale-bill of the 1st of January, 1848: as, for instance, three packages of meat (which is mentioned in class 4), each weighing $1\frac{1}{2}$ cwt., and each directed to a different ultimate consignee, have been charged $4\frac{1}{2}$ cwt., under the fifth class, with an additional charge of 2*d.* on every package; the entire sum thus charged has been less than the sum that would have been charged if each package had been charged under the parcel-rate.

The plaintiff contended that the company had no right to charge him, under such circumstances, as for goods of a miscellaneous description, and were bound to charge him only the rate charged according to the tonnage-rate under the class to which the goods belonged,—as in the instance mentioned under the fourth class: and on this head the questions were,—

First, whether the company were justified in charging such packages of goods, under the miscellaneous class; and, if not,—Secondly, whether the company would be entitled to charge the said packages under the parcels-rate.

The seventh head of claim of the plaintiff was in respect of charges made by the company, which he alleged exceeded the charges allowed to be taken by the company's act of parliament.

In each of the three scale-bills forming part of the fourth class, were certain specified articles which were to be charged according to such fourth class, and, in addition, a further charge of 50 per cent., or 100 per cent., as therein mentioned, was imposed on such goods.

All such specified articles were of the class for the *tonnage of which the company were authorized by their act of parliament [*566 (see 5 & 6 W. 4, c. cvii., s. 164) to charge at the rate of 3*d.* per ton per mile; and, in addition thereto, the company are entitled, under the 50th section of the 7 Vict. c. iii., to charge for locomotive or steam power, and for carriages, such a sum as they think expedient. The charges on the said scale-bills include both the carriage or tonnage of the said goods, and the locomotive or steam power and use of carriages; but no specific portion of the charges contained in the scale-bills is appropriated to either of such modes of charge; the whole charge under such scale-bills being charged by the company, and paid by the carrier, as the consideration for the performance by the company of the entire of those services.

The charge under the said fourth class, with the additional charge of 50 per cent., or 100 per cent., as the case may be, on the said specified articles now in question, exceeds the sum of 3*d.* per ton per mile.

The questions for the opinion of the court were,—first, whether the company were entitled to charge and take the said additional sums of 50 and 100 per cent. respectively on the said specified goods; and, if not,—secondly, whether they were entitled to charge and take so much of the said original charge, and 50 or 100 per cent. additional, as exceeds the 3*d.* per ton per mile, and a reasonable amount to be charged and taken by the company for the use of locomotive or steam power and carriages.

The eighth head of claim was as follows:—The plaintiff contends, that, when he has collected from several original consignors several parcels intended for several ultimate consignees, the whole of which together do not in weight exceed the dividing point between parcel and tonnage-rates, according to the scale-bill from time to time in force, and do not amount to 500 lbs. in weight, the company are not entitled, under the 171st section of *their act of 5 & 6 W. 4, c. cvii., or any other [*567 enactment, to charge each of such parcels separately, or the whole of such parcels together, as parcels, or a parcel, or otherwise than according to the tonnage-rate.

The plaintiff contends, that such several parcels, by his having collected them together, and by his delivering them to the company in one lot, and also receiving them from the company in one lot, become connected together, so that the company are not justified in charging them as single parcels or parcel; and that, if they cannot be treated as single parcels, the company can only charge for the same as tonnage goods, according to their weight, under the 164th section of their act of 5 & 6 W. 4, c. cvii., which authorizes a charge by them of so much per ton per mile.

The question for the opinion of the court was,—first, whether the

company can charge such parcels at the parcel-rate published in pursuance of the 171st section of the said act, where such parcels contain goods of the same class according to the classification of goods; and,—secondly, whether they can charge the same according to such parcel-rate, where the same contain goods of different classes in two or more packages of each class.

In an appendix annexed to the case were the following documents:—The scale-bill of the 1st of January, 1848; the scale-bill of the 15th of June, 1848; the scale-bill of the 17th of January, 1848; the additional charges paper of the 17th of July, 1848; the declaration and ticking-off note filled up as in the usual course of business; the form signed by the public on delivering goods; and two agreements between the company and Sherman, dated the 12th of June, 1848.

Peacock (with whom was *Willes*), for the plaintiff.—1. The first question is, whether the plaintiff is entitled *to recover back from the
 *568] defendants in this action the amount paid by him to them of certain charges, in addition to the charge for the carriage of the goods, for “loading, unloading, and risk of stowage,” under the scale-bill of the 15th of June, 1848, and for “loading, unloading, and covering,” under the scale-bill of the 17th of July, 1848. It is submitted that the entire charge is unjustifiable, and that the plaintiff is entitled to recover back the whole. By the 1 Vict. c. xcii., s. 44, the company are empowered to demand, receive, and recover a reasonable charge for the loading and unloading or weighing any articles, matters, or things which they may be *required* to load, unload, or weigh. That is the only enactment under which this charge is sought to be justified. In *Curling v. Long*, 1 Bos. & Pull. 634, it is laid down that all expenses of loading and unloading a ship are included in the freight. So here, the loading, unloading, and weighing is included in the tonnage-rate authorized to be charged by the acts of parliament. The weighing of the goods is not for the benefit of the party requiring the goods to be carried. The material clauses of the company’s act of incorporation, 5 & 6 W. 4, c. cvii., are the 164th, 166th, 167th, and 171st. The 164th prescribes the rates of tonnage to be taken by the company for the use of the railway. The 166th empowers the company to provide locomotive or stationary engines or other power for the drawing or propelling of any articles, matters, or things, &c., upon the railway, and to receive, demand, and recover such sums of money for the use of such engines or other power as the company shall think proper, in addition to the several other rates, tolls, or sums by that act authorized to be taken. The 167th section enables the company, if they shall think proper, to become
 *569] carriers of passengers, goods, &c., and to *make such reasonable charges for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by that act authorized to be taken. And the 171st section relates to the charge

to be made for small parcels. [JERVIS, C. J.—Where parties use their own trucks, and ask the company to load them, they are entitled to charge for so doing. MAULE, J.—The 44th section of the 1 & 2 Vict. c. xcii., applies to cases where the company are *required* to load and unload, as in the case of coals, unconnected with carrying. It may be that the customer may wish the company to load and unload, or to weigh and warehouse the goods: for that, the company are empowered to make an extra charge; but the rate for carriage includes the taking the goods into the hands of the company, and loading them on, and unloading them, from, the trucks.]

2. The second head of claim relates to the allowance of 10 per cent. formerly made to the plaintiff and other carriers, but now discontinued. This allowance was made by way of compensation for the classification and weighing the goods and filling up the ticking-off note,—a labour which was imposed by the company upon carriers, but not upon the rest of the public, and the imposition of which duty, the 10 per cent. allowance being discontinued, it is submitted, constitutes an inequality within the 175th section of the 5 & 6 W. 4, c. cvii.(a) [JERVIS, C. J.—The carrier weighs for his own convenience. *Keating*.—The case finds that “the carriers would require, for the purposes of their trade, to know, and have entries of, the particulars and weights of the goods sent.”] This falls within the principle of the decision of this court in *Parker v. The Great Western Railway Company*, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott, N. R. 835. [JERVIS, C. J.—The ground of that decision, so far as relates to this question, was, that *the [*570 making an allowance to other carriers, which was withheld from the plaintiff, constituted an *inequality*.] This, as between the public and the carrier, is also inequality. [MAULE, J.—Assuming your argument to be tenable, it does not give rise to a money demand. The company might probably be liable to an action for refusing to carry goods offered by the plaintiff unless he would do something which the act of parliament do not warrant them in requiring: but that is not the sort of claim which is the subject of this reference.] The question is not, whether money had and received will lie, but whether the plaintiff is entitled to the 10 per cent., or to a “reasonable allowance” in respect of the labour thus improperly cast upon him. The reference is of all matters in difference between the parties. [TALFOURD, J.—“Relative to the charges made by the defendants upon the plaintiff, and to payments made by the plaintiff to the defendants.” MAULE, J.—The object of the reference was, to settle the accounts between the parties.] The case, if insufficiently stated in this respect, ought to be sent back to the arbitrator; otherwise, the plaintiff may be barred by this reference in respect of any future claim. [JERVIS, C. J.—The

(a) Post, p. 592.

opinion of the court is, that this claim is not within the terms of the submission.]

3. The allowance of 1000*l.* a year to Sherman for the collection and delivery of parcels in London, constitutes an inequality of charge; for, the company thereby, in effect, undertake to carry for the public for less by 2*d.* per package than the plaintiff does, to whom no corresponding reduction is made. In *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399,† it was held that a charge of 65*s.* per ton made to all persons, except A. and B., who would be ready themselves to receive their goods *at Camden Town station, was *571] unequal, the company having agreed with A. and B. that they should carry all goods carried by the railway, from Camden Town to London, and deduct 10*s.* per ton out of the 65*s.* So, here, the effect of the arrangement with Sherman, is, that the company carry *and book* for those whose goods he brings, for the same price that they charge to the plaintiff for carriage only. It cannot be said that the company charge equally, if they carry for the public to their own doors, and for Parker to the *terminus* only. [MAULE, J.—The 1000*l.* a year is paid to Sherman out of the general funds of the company, in lieu of booking fees which he would otherwise have charged to the public. The first-class passengers might as well claim a deduction from their fares on that account.]

4. The fourth head of claim relates to the extra charge of 50 per cent. upon “packed parcels,” in addition to their weight in the highest class in the scale-bills. This charge clearly cannot be sustained; for, the case expressly finds that the company do not claim it from persons in trade, not being carriers: it is therefore a violation of the 171st section of the 5 & 6 W. 4, c. cvii. [MAULE, J.—Can the company demand of everybody 50 per cent. above the highest charge for “packed parcels?”] It is submitted that they cannot. [MAULE, J.—It seems unreasonable to say, that, if a man sends in one parcel of goods belonging to A., B., and C., the company shall be permitted to charge more for the carriage than if the whole were carried for one person. The real object of the company, no doubt, was, to overcharge the carrier, in order to absorb all the carrying business to themselves. They had no right to do this. They are bound to do the same work, and at the same price, for carriers, as for other people. JERVIS, C. J.—That was decided in the former case of *Parker v. The Great Western Railway Company*.]

*572] *5. Under the scale-bills issued by them, and the 171st section of the 5 & 6 W. 4, c. cvii., the company were entitled to charge the plaintiff “tonnage-rate” only, upon the aggregate weight of all packages of less than the weights limited by the scale-bills respectively, containing one *class* of goods, though of different *kinds* or descriptions, whether such packages were intended for the same ultimate con-

signee, or for several. The charge made in this respect is clearly in violation of the proviso in the 171st section of the 5 & 6 W. 4, c. cvii., that the power to fix the charge for small packages "shall not extend to articles, matters, or things sent in *large aggregate quantities*, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to *single parcels*, unconnected with parcels of a like nature, which may be sent upon the railway at the same time," as well as of the 50th section of the 7 & 8 Vict. c. iii.: and the fact of the person employing the company to carry the goods being the ultimate consignee or not, does not constitute such a difference of circumstances as to warrant a difference of charge, under the last-mentioned clause. [JERVIS, C. J.—This is the same point that we decided the other day in *Edwards v. The Great Western Railway Company*, post, p. 588.]

6. The sixth head of claim arises upon the scale-bill which was in force from the 1st of January till the 15th of June, 1848. The goods mentioned under this head being all of one class, though intended for different consignees, ought to have been charged at the tonnage and not the parcels-rate, and without the additional 2d. per package imposed upon "miscellaneous goods."

7. The 164th section of the 5 & 6 W. 4, c. cvii., enables the company to demand and receive for the tonnage of all articles, matters, or things which shall be conveyed *upon or along their railway, any rates or tolls not exceeding certain specified rates, of which the highest [*573 was 3d. per ton per mile. The 166th section empowers them to *provide* locomotive engines or other power for the propelling of goods, &c., along the railway, and to take "for the use of such engines or power" such sums as they shall think proper, in addition to the several other rates, tolls, or sums by that act authorized to be taken. The 167th section enables them to *use and employ* locomotive engines or other moving power, and in carriages or wagons drawn or propelled thereby to convey upon and along the railway, passengers, goods, &c., "and to make such reasonable charges for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by that act authorized to be taken." The 50th section of the 7 & 8 Vict. c. iii., in its enacting part merely follows out the 167th section of the former act: it enacts that "it shall be lawful for the company, whenever they shall act as carriers, or shall provide locomotive or steam power or carriages for the conveyances of passengers, goods, &c., to charge for such locomotive or steam power and carriages such sum (not exceeding the sums, if any, limited by the recited acts, or any of them), and that either per ton or per mile, or by fixed charges, as they shall think expedient." The question is, whether the company may charge more than a reasonable sum for providing carriages and locomotive power, in addition to the full amount of toll. [JERVIS, C. J.—The construction

put upon s. 50, by the arbitrator, is, that the company are entitled under that section to charge for locomotive or steam power and for carriages such a sum as they think expedient, in addition to the tonnage which they are authorized by the 5 & 6 W. 4, c. cvii. s. 164, to charge.] The court is not bound by the arbitrator's construction of the act of parliament. [MAULE, J.—Section 50 of the 7 & 8 Vict. c. iii., may be *574] satisfied by considering *it as not intended to repeal s. 167 of the former act, but to enable the company to adopt a different mode of ascertaining the charges they are to make. They must charge a *reasonable* sum for the use of the locomotive power and carriages; and, instead of charging at per ton per mile, as under the former act, s. 50 enables them to adopt any of the other modes of ascertaining the charge therein pointed out. It is an enabling clause, empowering the company to do something in addition to what they could do before. The question is, whether they have complied with the condition, that the charge shall be reasonable. It seems to me that the proper answer to the questions proposed to us by the arbitrator upon this head, will be, that the company are entitled to take the additional 50 or 100 per cent., provided they do not exceed a reasonable sum, for *conveyance*, in addition to the charges for the use of locomotive power and carriages.]

8. The last question is, whether, where the carrier has collected from several original consignors several parcels which are intended for several ultimate consignees, the whole of which together do not in weight exceed the dividing point between parcel and tonnage-rates according to the scale-bill, and do not amount to 500lbs. in weight, the company are entitled under the 5 & 6 W. 4, c. cvii., s. 171, to charge each of such parcels separately, or the whole of such parcels together, as parcels, or a parcel, or otherwise than according to the tonnage-rate. It is submitted that they are not, that the case falls expressly within the proviso of s. 171, and that goods so circumstanced must be charged according to the tonnage-rate. [JERVIS, C. J.—May not the company charge the whole as *one parcel*, if under 500lbs. weight? MAULE, J.—The company clearly are not in such a case limited to the tonnage-rate. They could not charge for the goods as several parcels; but they were entitled to charge the whole as *one parcel*.]

*575] **Keating* (with whom were *Channell*, Serjt., *Hoggins*, and *Cripps*), for the defendants.—1. As to the first head of claim, *Keating* admitted that he could find nothing in either of the acts of parliament to justify him in thinking he could induce the court to alter the opinion they had already expressed: and he further stated that the charge for loading, unloading, &c., had been discontinued by the company. 2, 3. As to the second and third heads of claim, the opinion of the court being already intimated in favour of the defendants, nothing was said.

4. It may be conceded that the company are not justified in making

unequal charges. But the arbitrator here has not found that they have done so: all he finds, is, that they have not been so astute to detect "packed parcels," in the case of ordinary persons, as they have in the case of carriers. It is difficult to see how money had and received will lie for that. The arbitrator does not find that the company bound themselves to, or sanctioned, a different rate of charge. In *Parker v. The Great Western Railway Company*, in 1844, it appeared that the company *did* bind themselves to the inequality. The question here is, whether a mere inequality of application of the scale-bill charge, gives the plaintiff a right to complain. [MAULE, J.—The scale-bill is not required by the act of parliament. Everything else being the same,—suppose the company have taken from carriers 50 per cent. more than they have claimed from other persons; would not that give a cause of action against the company?] If the fact had been established before him, the arbitrator would have found the fact of inequality. [MAULE, J.—He has found it in substance. WILLIAMS, J.—“No reduction or advance in the said rates and tolls shall, either directly or indirectly, be made partially or in favour of or against any particular person or company:” 5 & 6 W. 4, c. cvii., s. 175. Surely this is an indirect deduction in favour of the public, to the exclusion of *carriers. [*576 JERVIS, C. J.—The company require information from carriers which they do not require from the public. This clearly is an over-charge.]

5 The fifth head of claim divides itself into two periods,—the one ending with the 15th of June, 1848,—the other commencing on that day. No objection arises here upon the score of inequality, as between the public and carriers. The question is, whether, when a carrier brings several parcels consisting each of goods of different kinds, though of the same class, the company are not justified in charging them as separate parcels. It is submitted that they are. Down to the 15th of June, 1848, the question arises upon the first scale-bill; and, as to that, inasmuch as that scale-bill deals with “kind” and “class” as synonymous, it must be admitted that the case is disposed of by the opinion expressed by the court upon the argument of *Edwards v. The Great Western Railway Company*, post, p. 588. But all subsequent to the 15th of June, 1848, rests upon the 171st section of the 5 & 6 W. 4, c. cvii., irrespectively of the scale-bill. That section,—which enacts, “that it shall be lawful for the company from time to time to make such orders for fixing, and by such orders to fix, the sum to be charged by the company in respect of small parcels (not exceeding 500lbs. weight each), as shall to them seem proper,”—gives the company power to make a differential charge in respect of small parcels, that is, parcels not exceeding 500lbs. weight. Since the 15th of June, 1848, the company have made 1 cwt. the dividing line between the parcel and the tonnage-rate. The question is, whether or not the company had power to charge

these as separate parcels, either to the public or to carriers. It is contended on the part of the plaintiff that they had not, because they *577] were brought at one time, in one *wagon-load. That, however, clearly makes no difference. A further reason given, is, that they are of the same *class*. The question, therefore, to be decided, is, whether the circumstance of their consisting of goods which are enumerated in the same class in the scale-bill, brings them within the proviso in s. 171,—“that the provision thereinbefore contained shall not extend to articles, matters, or things sent in *large aggregate quantities*, although made up of separate and distinct parcels, such as, bags of sugar, coffee, meal, and the like, but only to single parcels *unconnected with parcels of a like nature*, which may be sent upon the railway at the same time.” The object of the legislature is manifest: if five tons of flour be sent in fifty bags, each bag shall not be charged as a separate parcel, but the whole shall be charged as an aggregate quantity. [JERVIS, C. J.—For the period to which the first scale-bill applies, our decision must be adverse to the defendants; but, as to the subsequent period, as at present advised, it will be in their favour.]

6. The sixth head of claim, which arises upon the scale-bill in force until the 15th of June, 1848, must, of course, follow the fate of that part of the fifth head which relates to the same period of time.

7. The answer, to the question intended to be raised, upon the seventh head of claim, is of no practical importance to the company. The arbitrator finds that the goods to which it relates are of the class for the tonnage of which the company are authorized by the 5 & 6 W. 4, c. cvii., s. 164, to charge at the rate of 3*d.* per ton per mile, and, in addition thereto, to charge, under the 7 & 8 Vict. c. iii., s. 50, for locomotive or steam power, and for carriages, such a sum as they think expedient. He further finds that the charges on the scale-bills include both the carriage or tonnage of the goods, and the locomotive or steam power and use of carriages: but that no specific portion of the charges contained *578] in the scale-bills is *appropriated to either of such modes of charge, the whole charge being imposed and paid as the consideration for the performance by the company of the entire of those services; and that the charge, with the additional 50 or 100 per cent., exceeded 3*d.* per ton per mile. The answer to the first question proposed by the arbitrator, should, it is submitted, be given in the affirmative. [MAULE, J.—Provided the company do not exact an unreasonable sum for conveyance, under the 5 & 6 W. 4, c. cvii., s. 167.] The arbitrator has not found the charge to be unreasonable. [MAULE, J.—Are we therefore to assume it reasonable?] It is for the plaintiff to make out his case. [MAULE, J.—Consistently with the finding, it may have been either the one or the other. The answer may be in the alternative: the company are entitled, provided the sum be reasonable.]

[The arbitrator was afterwards asked, and he stated that he did not

consider that he had any evidence before him to determine whether this charge was reasonable or otherwise, and therefore he left it open.]

8. The questions presented under the eighth head of claim, must be determined in favour of the defendants. The classification is not the criterion, but the circumstance of the goods being of the same kind, such as, bags of sugar, &c. The plaintiff contends that the bringing them together in one lot entitles the carrier to insist upon their being charged according to the tonnage-rate, instead of as separate parcels or a parcel. [MAULE, J.—That is preposterous. In that case, he might divide a pound into sixteen ounce parcels, and claim to pay tonnage-rate. If the carrier delivers to the company a number of goods in separate parcels, they may be charged as separate parcels, unless prevented by the operation of the 5 & 6 W. 4, c. cvii., s. 171, or the contract in the scale-bill. The circumstance of the goods going to different consignees makes no difference in *favour of the company: so, on the other hand, the circumstance of their being brought together at the [*579 same time, makes no difference against the company.]

Peacock, in reply.—All the questions are disposed of, except those arising upon the fifth and eighth heads of claim. [JERVIS, C. J.—Upon the fifth, so far as regards the period when the first scale-bill was in force, viz., down to the 15th of June, 1848, Mr. *Keating* agrees that our decision must be against the company.] The company had no right to make the distinction they assumed to make, between goods of different kinds, but of one class, when brought to them by a carrier and when brought by one of the public. The former decision of this court in *Parker v. The Great Western Railway Company* shows that the company are bound to treat all alike. [JERVIS, C. J.—Where one person is the consignee of several parcels, the company waive their right to charge them separately. It is not found, as it is in the packed parcels case, that a different rule is adopted towards carriers from that which is adopted towards the public.] It is not expressly so found; but the statement of the arbitrator leaves no reasonable ground for doubt that the company do not in this respect deal equally between carriers and the public. [JERVIS, C. J.—When the facts are carefully looked at, I think this does appear to have been an unequal mode of charging. The fact of the goods being consigned to different persons, does not vary “the circumstances,” within the meaning of the 7 & 8 Vict. c. iii., s. 50. WILLIAMS, J.—The company might, I think, have charged *all* as parcels; but, as they have thought fit to charge tonnage-rate to the public, they had no right to charge otherwise to carriers. MAULE, J.—It may be that the higher charge is sustainable. But the company have clearly adopted an unequal mode of charge. TALFOURD, J.—The company have nothing to do with the directions *on the [*580 parcels.] As to the last head of claim,—it is not denied, that, where several parcels are delivered together, and do not altogether

exceed 500lbs. weight, the whole may be charged as a parcel, or that parcels consisting of goods of different classes may be charged as separate parcels: but it is submitted, that parcels containing goods of one class, being "parcels of a like nature" within the meaning of the 5 & 6 W. 4, c. cvii., s. 171, cannot be charged separately. [JERVIS, C. J.—The goods are not classified for the purpose of parcel or no parcel, but for a totally different purpose.]

JERVIS, C. J.—The court having, in the course of the discussion of this case, intimated an opinion as each head of claim was brought under its notice, and the matters in dispute being narrowed by the admissions of counsel, there remains but little to be added.

1. The first claim of the plaintiff, is, to recover back from the defendants the amount paid by him to them of certain charges, in addition to their carriage rates, made by the defendants, from the 15th of June, 1848, to the 17th of July, 1848, for "loading, unloading, and risk of stowage," and, from the 17th of July, 1848, to the 1st of May, 1851 (when the scale-bill was again altered), for "loading, unloading, and covering" of goods. The 44th section of the 1 Vict. c. xcii., empowers the company from time to time to demand, receive, and recover a reasonable charge for the loading and unloading or weighing any articles, matters, or things which they may be *required* to load, unload, or weigh. With reference to this charge, the plaintiff insists, that, inasmuch as his men assisted the company, and as the charge for carrying included loading and unloading, and he did not *require* them to load, unload, or weigh, the company were in effect charging less to the public than they charged to him. We thought, and still think, that the company were *authorized, under that section, to make an additional
*581] charge for loading and unloading only when that kind of work was done by them, not as carriers, but for other people carrying on their own account; but that, when they act as carriers themselves, the charge for "carrying," includes "loading, unloading, and weighing." I apprehend, therefore, that, as the company were not *required* by the plaintiff to load, unload, or weigh, this claim ought to be allowed.

2. Under the second head, the plaintiff claims an allowance of 10 per cent. on the moneys paid by him to the company for carriage, in respect of the performance by him of certain matters which the company required to be done by him and other carriers, and not by the rest of the public,—the allowance being one which was formerly made by the company, but had been discontinued. The short answer to this claim, is, that it is not one in respect of which an action for money had and received can be maintained, whatever other remedy the plaintiff may have against the company.

3. The third head of claim arises out of the allowance by the company to Mr. Sherman, of 1000*l.* a year for collecting and delivering parcels for them in London. It is insisted, for the plaintiff, that the

company are bound to make their charges equal to all the world; and that, inasmuch as they make the allowance of 1000*l.* a year to Mr. Sherman, in consideration of his giving up the charge of 2*d.* for booking, which is taken by the plaintiff and all other carriers, that constitutes an inequality of charge, as between the plaintiff and other carriers, and Sherman. That argument received its answer at once: the allowance of 1000*l.* a year to Sherman out of the general funds of the company for services rendered by him for the company, does not constitute an inequality of charge, of which the plaintiff has any right to complain.

*4. The fourth head of claim relates to "packed parcels." [*582 This charge,—of 50 per cent. in addition to their weight in the highest, or fourth class, in the scale-bills of the 1st and 17th of January, 1848, and the fifth class in the scale-bill of the 15th of June, 1848,—is, on the part of the defendants, admitted to be untenable. It is a charge which is not made upon the public: and, if so, it is conceded that the plaintiff is entitled to recover in respect of it. The 175th section of the 5 & 6 W. 4, c. cvii., as well as the 50th section of the 7 & 8 Vict. c. iii., expressly provide that the charges shall be imposed *equally* upon all persons using the railway: and it is admitted that this additional charge for "packed parcels" is imposed upon carriers only, and not upon other persons using the railway. Under this head of claim, therefore, we hold that the plaintiff is entitled to recover the overcharge.

5. The fifth head of claim depends upon the construction, partly of the scale-bills, and partly of the 171st section of the 5 & 6 W. 4, c. cvii. It is admitted that the question is concluded by the intimation thrown out by the court the other day during the argument of *Edwards v. The Great Western Railway Company*, vide post, p. 588, so far as concerns the scale-bill in force down to the 15th of June, 1848, and that to that extent the plaintiff is entitled to recover; because, whether the company would be justified or not in charging the articles in question as parcels, if they profess by their scale-bill to carry at particular rates or in a particular manner for the public, they are bound to place the carrier upon the same footing. The question subsequently to the 15th of June, 1848, depends upon the 171st section of the statute, irrespectively of the scale-bill. That section enacts "that it shall be lawful for the company from time to time to make such orders for fixing, and by such orders to fix, *the sum to be charged by them in respect of small parcels (not [*583 exceeding 500*lbs.* each) as to them shall seem proper: provided always that the provision thereinbefore contained shall not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature which may be sent upon the railway at the same time."

exceed 500lbs. weight, the whole may be charged as a parcel, or that parcels consisting of goods of different classes may be charged as separate parcels: but it is submitted, that parcels containing goods of one class, being "parcels of a like nature" within the meaning of the 5 & 6 W. 4, c. cvii., s. 171, cannot be charged separately. [JERVIS, C. J.—The goods are not classified for the purpose of parcel or no parcel, but for a totally different purpose.]

JERVIS, C. J.—The court having, in the course of the discussion of this case, intimated an opinion as each head of claim was brought under its notice, and the matters in dispute being narrowed by the admissions of counsel, there remains but little to be added.

1. The first claim of the plaintiff, is, to recover back from the defendants the amount paid by him to them of certain charges, in addition to their carriage rates, made by the defendants, from the 15th of June, 1848, to the 17th of July, 1848, for "loading, unloading, and risk of stowage," and, from the 17th of July, 1848, to the 1st of May, 1851 (when the scale-bill was again altered), for "loading, unloading, and covering" of goods. The 44th section of the 1 Vict. c. xcii., empowers the company from time to time to demand, receive, and recover a reasonable charge for the loading and unloading or weighing any articles, matters, or things which they may be *required* to load, unload, or weigh. With reference to this charge, the plaintiff insists, that, inasmuch as his men assisted the company, and as the charge for carrying included loading and unloading, and he did not *require* them to load, unload, or weigh, the company were in effect charging less to the public than they charged to him. We thought, and still think, that the company were *authorized, under that section, to make an additional
*581] charge for loading and unloading only when that kind of work was done by them, not as carriers, but for other people carrying on their own account; but that, when they act as carriers themselves, the charge for "carrying," includes "loading, unloading, and weighing." I apprehend, therefore, that, as the company were not *required* by the plaintiff to load, unload, or weigh, this claim ought to be allowed.

2. Under the second head, the plaintiff claims an allowance of 10 per cent. on the moneys paid by him to the company for carriage, in respect of the performance by him of certain matters which the company required to be done by him and other carriers, and not by the rest of the public,—the allowance being one which was formerly made by the company, but had been discontinued. The short answer to this claim, is, that it is not one in respect of which an action for money had and received can be maintained, whatever other remedy the plaintiff may have against the company.

3. The third head of claim arises out of the allowance by the company to Mr. Sherman, of 1000*l.* a year for collecting and delivering parcels for them in London. It is insisted, for the plaintiff, that the

company are bound to make their charges equal to all the world; and that, inasmuch as they make the allowance of 1000*l.* a year to Mr. Sherman, in consideration of his giving up the charge of 2*d.* for booking, which is taken by the plaintiff and all other carriers, that constitutes an inequality of charge, as between the plaintiff and other carriers, and Sherman. That argument received its answer at once: the allowance of 1000*l.* a year to Sherman out of the general funds of the company for services rendered by him for the company, does not constitute an inequality of charge, of which the plaintiff has any right to complain.

*4. The fourth head of claim relates to "packed parcels." [*582 This charge,—of 50 per cent. in addition to their weight in the highest, or fourth class, in the scale-bills of the 1st and 17th of January, 1848, and the fifth class in the scale-bill of the 15th of June, 1848,—is, on the part of the defendants, admitted to be untenable. It is a charge which is not made upon the public: and, if so, it is conceded that the plaintiff is entitled to recover in respect of it. The 175th section of the 5 & 6 W. 4, c. cvii., as well as the 50th section of the 7 & 8 Vict. c. iii., expressly provide that the charges shall be imposed *equally* upon all persons using the railway: and it is admitted that this additional charge for "packed parcels" is imposed upon carriers only, and not upon other persons using the railway. Under this head of claim, therefore, we hold that the plaintiff is entitled to recover the overcharge.

5. The fifth head of claim depends upon the construction, partly of the scale-bills, and partly of the 171st section of the 5 & 6 W. 4, c. cvii. It is admitted that the question is concluded by the intimation thrown out by the court the other day during the argument of *Edwards v. The Great Western Railway Company*, vide post, p. 588, so far as concerns the scale-bill in force down to the 15th of June, 1848, and that to that extent the plaintiff is entitled to recover; because, whether the company would be justified or not in charging the articles in question as parcels, if they profess by their scale-bill to carry at particular rates or in a particular manner for the public, they are bound to place the carrier upon the same footing. The question subsequently to the 15th of June, 1848, depends upon the 171st section of the statute, irrespectively of the scale-bill. That section enacts "that it shall be lawful for the company from time to time to make such orders for fixing, and by such orders to fix, *the sum to be charged by them in respect of small parcels (not [*583 exceeding 500*lbs.* each) as to them shall seem proper: provided always that the provision thereinbefore contained shall not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature which may be sent upon the railway at the same time."

On the part of the company it was insisted that they were justified in making the charge here complained of, because, in order to entitle the plaintiff to avail himself of the above proviso, the articles must be of the same *kind* and in parcels of *the like nature*. On the other hand, it is submitted, that, assuming that to be so, the company do not apply that principle of construction equally to all; but that, in applying it, they look to the ultimate consignee of the goods; and, where one carrier sends a number of packages to one ultimate consignee, the charge is made in the aggregate; but that, where another carrier, or the same, sends goods of a similar kind, addressed to different ultimate consignees, they are charged as separate parcels, and not in the aggregate. And it is suggested that this mode of charging is unequal, and in violation of the 50th section of the statute in force at the time to which the charge relates, viz., the 7 & 8 Vict. c. iii., which provides that, in whatever way the charges thereby authorized are made, “they shall be made *equally* to all passengers, and to all persons, in respect of all animals, and of all goods, wares, merchandise, articles, matters, and things *of a like description and quality*, and conveyed in or propelled by a like carriage or engine passing only over the same portion of, and over the same distance along, the railway, and *under the like circumstances*; and that no reduction or advance in any of such charges shall be made partially, either *584] directly or indirectly, in favour of or against any *particular company or person.” These goods, it is said, are of the like description and quality, and conveyed in and propelled by a like carriage and engine, and *under the like circumstances*; for, that the fact of the person employing the company to carry the goods being the ultimate consignee or not, does not give rise to a difference of *circumstances* to justify an inequality of charge. To the extent of the difference between what the company would charge for the goods when directed to one or to different ultimate consignees, I am of opinion that the plaintiff is entitled to recover the overcharge in this action for money had and received. We need not enter upon the general question, whether he is entitled to recover the whole, that not being now suggested as a matter for our decision.

6. The sixth head of claim arises upon the charge for the carriage of packages of meat, which being all of one kind, should have been charged in the fourth or the fifth class under the respective scale-bills, and not in the miscellaneous class, and therefore the company were not entitled to make the charge of 2*d.* per package.

7. The seventh head of claim gives rise to considerable difficulty, not so much with reference to the construction of the act of parliament, as with reference to the question presented to us by the arbitrator. Whatever difficulty there might be in arriving at a conclusion as to the proper construction of the 50th section of the 7 & 8 Vict. c. iii., that now becomes unimportant; for, the arbitrator has put his

own construction upon it,—holding that the company are entitled under that section, in addition to the rate of 3*d.* per ton per mile which they are authorized to charge by the 5 & 6 W. 4, c. cvii., s. 164, to charge for locomotive or steam power, and for carriages, such a sum as they think expedient: and he asks us,—first, whether the company are entitled to charge and take the additional sums of 50 per cent. and *100 per cent. respectively on certain specified articles which [*585 are to be charged according to the fourth class in the scale-bills, —and, if not, secondly, whether they are entitled to charge and take so much of the original charge, and the 50 per cent. or 100 per cent. additional, as exceeds the 3*d.* per ton per mile and a reasonable amount for the use of locomotive or steam power and carriages. The question arises thus,—the 164th and 165th sections of the 5 & 6 W. 4, c. cvii., empower the company to receive certain rates of tonnage in respect of goods, and certain tolls in respect of passengers or cattle carried upon or along the railway. The 166th section empowers them “to provide locomotive or stationary engines or other power for the drawing or propelling of any articles, matters, or things, persons, cattle, or animals upon the said railway, &c., and to receive, demand, and recover such sums of money for the use of such engines or other power as the said company shall think proper, in addition to the several other rates, tolls, or sums by this act authorized to be taken.” And the 167th section authorizes them, “if they shall think proper, to use and employ locomotive engines or other moving power, and in carriages or wagons drawn or propelled thereby to convey upon the said railway, &c., all such passengers, cattle, and other animals, goods, wares, and merchandise, articles, matters, and things, as shall be offered to them for that purpose, and to make such reasonable charges for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by this act authorized to be taken: provided always, that it shall not be lawful for the said company, or for any person using the said railway as carriers, to charge for the conveyance of any passenger upon the said railway any greater sum than 3½*d.* per mile, including the toll or rate hereinbefore granted.” Then comes the 50th section of the 7 & 8 Vict. c. iii., which *enacts “that it shall be lawful for [*586 the company, *whenever they shall act as carriers*, or shall provide locomotive or steam power or carriages for the conveyance of passengers, animals, goods, wares, merchandise, articles, matters, or things, to charge for such locomotive or steam power and carriages, such sum, not exceeding the sums (if any) limited by the said recited acts, or any of them, and that either per ton or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, as they shall think expedient:” with the proviso as to equality of charges already adverted to. Without discussing the propriety of the construction which the arbitrator has put upon that section, I apprehend it to be perfectly clear that

the company are not bound in their charge specifically to demand so much per ton under the 164th section of the 5 & 6 W. 4, c. cvii., and so much per mile for the use of the locomotive power and carriages. They are entitled to charge, as carriers, for the conveyance of the goods, under s. 167, a reasonable sum beyond the 3*d.* per ton per mile. Whether the sum charged in this case was reasonable or otherwise, is a question for the arbitrator: if unreasonable, the plaintiff will be entitled to recover back the excess.

8. The eighth head of claim likewise raises a difficulty, from the form in which the questions are presented to us. The plaintiff contends that, when he has collected several parcels for conveyance to several ultimate consignees, in the whole not exceeding in weight the dividing point between parcel and tonnage-rates according to the scale-bill, and not amounting to 500lbs. in weight, the company are not, under the 5 & 6 W. 4, c. cvii., s. 171, or any other enactment, entitled to charge each parcel separately, or otherwise than according to the tonnage-rate. On the other hand, the company insist that the fact of the several parcels being brought together to be carried, makes no difference. The 171st *587] section enables the *company to fix the sum to be charged for the conveyance of small parcels,—that is, parcels not exceeding 500lbs. weight each,—as to them shall seem proper; with a proviso that that provision shall not extend to “articles, matters, or things sent in large *aggregate quantities*, although made up of separate and distinct parcels, such as, bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of *a like nature* which may be sent upon the railway at the same time.” If the parcels are such that the company are entitled to charge them at the parcel-rate to the public, under that section, the fact of the contents being goods of the same “class” in the scale-bill for a different purpose, does not dis-entitle the company so to charge them.

I have now gone through the various heads of claim in respect of which our opinion was asked, and I believe I have substantially stated the opinion of the court upon each of them, for the guidance of the arbitrator in assessing the damages; the case will, therefore, go back to him, and he will adjust the rights of the parties in conformity therewith.

Rule accordingly.

***EDWARDS and Another, Assignees of RICHARD PARKER, a Bankrupt, v. THE GREAT WESTERN RAILWAY COMPANY. [588 Nov. 15.**

1. The Great Western Railway Company, by its act of incorporation, 5 & 6 W. 4, c. cvii., was empowered to charge certain rates and tolls for the use of their railway and the carriage of passengers and goods thereon. By a subsequent act, 2 Vict. c. xxvii., s. 24, it was provided that those rates and tolls should be at all times charged *equally* to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, &c., of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line; and that no reduction or advance should be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the same portion of the railway.

By the 7 & 8 Vict. c. iii., s. 48, the last-mentioned provision was repealed, and in terms re-enacted by s. 49; and by s. 50, it was enacted that it should be lawful for the company, whenever they should act as carriers, or should provide power or carriages for the conveyance of passengers, goods, &c., to charge for such power and carriages such sum (not exceeding certain limits), and that either per ton, or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, as they should think expedient: provided, that, in whatever way the charges were made, they should be made *equally* to all passengers, and to all persons, in respect of all goods, &c., of a like description and quality, and conveyed in or propelled by a like carriage or engine, passing only over the same portion of, and over the same distance along, the railway, *and under the like circumstances*; and that no reduction or advance in any of such charges should be made partially, either directly or indirectly, in favour of or against any particular company or person:—

Held, that the fact of the person sending the goods to be conveyed along the railway being a carrier, did not constitute such a dissimilarity of circumstances, as to justify a difference of charge as between him and the rest of the public.

2. By the 171st section of the 5 & 6 W. 4, c. cvii., the company were authorized to fix the sum to be charged in respect of *small parcels* (not exceeding 500lbs. weight) as to them should seem proper: provided, that that provision should not extend to articles, matters, or things sent in *large aggregate quantities*, although made up of separate and distinct parcels, such as, bags of sugar, coffee, &c., but only to *single parcels*, unconnected with *parcels of a like nature*, which might be sent upon the railway at the same time.

The company issued "scale-bills," specifying in classes the charges to be made for carriage,—each class containing various kinds of goods; and at the end a "miscellaneous class," comprising goods "not being aggregate of one class or kind," for which a higher tonnage-rate was exacted, and also an additional charge of 2d. per package:—

Held, that the company were not justified in charging under the "miscellaneous class" goods which were aggregate of several kinds, but all contained in one class.

3. Held also, that the carrier who brought the goods to, and received them from the company at the end of the journey, was to be treated as the consignee, without reference to the ultimate destination of the goods.

4. Held also, that the carrier was not entitled to any allowance in respect of assistance in the loading, unloading, or weighing, given by his men to the company, voluntarily, or for the carrier's own convenience.

5. The company being under an agreement with one Kent to make him an allowance of 10 per cent. upon the sums paid by him for carriage of goods, in consideration of services rendered by him, and having discontinued that allowance in consequence of a former decision of this court, Kent sued them for their breach of contract, and they compromised that action and paid him 500*l.* to cancel the agreement:—Held, that this did not constitute an inequality of charge as between Kent and other carriers.

6. The plaintiff having, *after* notice of action, served the company with a written demand of interest under the statute 3 & 4 W. 4, c. 42, s. 28:—Held, that the arbitrator, under a submission of "all matters in difference," might award the plaintiff interest, notwithstanding the notice of action did not contain a demand of interest; and, further, that, assuming a notice of action to have been necessary, the want or insufficiency of such notice could not be taken advantage of, since the 5 & 6 Vict. c. 97, s. 3, unless pleaded specially.

THIS was an action of debt. The declaration stated that the defend-

ants were indebted to Parker, before he became a bankrupt, in 10,000*l.*,
 *589] for money received *by them for his use, and for money found
 due from them to him on an account stated.

The defendants pleaded never indebted, "by statute."

The cause came on to be tried before WILDE, C. J., at the sittings for London after Michaelmas Term, 1849, when a verdict was entered for the plaintiffs by consent, debt 10,000*l.*, damages 2000*l.*, costs 40*s.*, subject to a special case, to be settled by an arbitrator, who, in the event of the court deciding in favour of the plaintiffs, was empowered to direct for what amount the verdict should be entered, and to whom the cause and all matters in difference between the said parties were referred.

The arbitrator stated the following case:—

The particulars of demand stated that the action was brought to recover 6320*l.* 7*s.* 7*d.* for moneys overcharged by, and paid to, the defendants, by Parker, and discounts due and refused to be allowed by the defendants to Parker, upon or in respect of the carriage of certain goods carried by the defendants for Parker between the months of May, 1844, and May, 1846, and before he became bankrupt,—the full particulars whereof were contained in a notice of action served upon the secretary of the defendants before the commencement of the suit, and in certain books or accounts which accompanied and were delivered with
 *590] such notice, and that the plaintiffs *would also claim interest on
 such moneys at 5*l.* per cent. per annum from the respective times when the same were paid, until repayment thereof.

Parker, the bankrupt, during the times hereinafter mentioned or referred to, was a common carrier, having his principal place of business at the New Inn Yard, Old Bailey, London, and was in the habit of carrying goods for hire between that place and various places in the West of England, employing the Great Western Railway Company for that purpose, to carry the goods on their railway for so much of the journey as might be convenient to him, and performing the rest of the journey, that is to say, between the company's stations and the place where he first received, or finally delivered, the goods, by his own agents. All the goods of Parker, mentioned in this case, were delivered by him to the company at one of their stations, before being carried by them; and, after having been carried by them, were received by Parker, or his agent, from them, also at one of their stations.

The defendants are the Great Western Railway Company mentioned in and incorporated by the 5 & 6 W. 4, c. cvii., which received the royal assent on 31st August, 1835.

Section 163 gave all persons liberty to pass along and upon and to use the Great Western Railway, with carriages properly constructed, on payment of certain rates and tolls, not exceeding the amounts mentioned in the two following sections.

Section 166 empowered the company to provide locomotive or stationary engines, or other power, for the drawing or propelling of any articles, matters, or things, persons, cattle, or animals, upon the said railway, and also along and upon any other railway communicating therewith; and to receive, demand, and recover such sum of money, for the use of such engines or other *power, as the said company should think proper, in addition to the several other rates, tolls, [*591 or sums by that act authorized to be taken.

Section 167 authorized the company, if they should think proper, to use and employ locomotive engines, or other moving power, and, in carriages or wagons drawn or propelled thereby, to convey upon the said railway, and also along and upon any other railway communicating therewith, all such passengers, cattle, and other animals, goods, wares, and merchandise, articles, matters and things, as should be offered to them for that purpose, and (with certain limits to the charge for the conveyance of passengers) to make such reasonable charges for such conveyance as they might from time to time determine upon, in addition to the several rates or tolls by that act authorized to be taken.

Section 171 enacted, that it should be lawful for the company from time to time to make such orders for fixing, and by such orders to fix, the sum to be charged by the company in respect to small parcels (not exceeding 500lbs. weight each), as to them should seem proper: provided always, that the provision thereinbefore contained should not extend to articles, matters, and things, sent in *large aggregate quantities, although made up of separate and distinct parcels*, such as, bags of sugar, coffee, meal, and the like, but only to single parcels, unconnected with parcels of a like nature, which might be sent upon the railway at the same time.

Section 174 enacted, that it should be lawful for the said company from time to time as they should think fit, to reduce all or any of the rates or tolls by that act authorized to be taken, and to take the reduced rates, and afterwards from time to time again to raise the same, or any of them, and then to take such higher rates, so that the same respectively should not at any time exceed the amount by that act authorized.

*Section 175 provided that the aforesaid rates and tolls to be taken by virtue of that act, should at all times be charged *equally* [*592 *and after the same rate per ton per mile*, throughout the whole of the said railway, in respect of the same description of articles, matters, or things, and that no reduction or advance in the said rates and tolls should, either directly or indirectly, be made partially or in favour of or against any particular person or company, or be confined to any particular part of the said railway; but that every such reduction or advance of rates and tolls upon any particular kind or description of articles, matters, or things, should extend to and take place, throughout the whole and every part of the railway, upon and in respect of the same description of articles, matters, and things so reduced or advanced, and

should extend to all persons whomsoever using the same, or carrying the same description of articles, matters, and things thereon.

The 1 Vict. c. xcii., which received the royal assent on the 3d of July, 1837, enacted, amongst other things, in s. 44, that it should be lawful for the company, from time to time and at all times thereafter, to demand, receive, and recover a reasonable charge for the loading and unloading or weighing any articles, matters, or things which they might be required to load, unload, or weigh.

The 2 Vict. c. xxvii., which received the royal assent on the 4th of June, 1839, enacted, in s. 24, that the charges by the said acts, or either of them, authorized to be made for the carriage of any passengers, goods, animals, or other matters or things to be conveyed by the company, or for the use of any steam power or carriage to be supplied by the company, should be *at all times charged equally to all persons*, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages, of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion *593] of the line; and no *reduction or advance in any charge for the conveyance by the said company, or for the use of any locomotive power to be supplied by them, should be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the same portion of the railway.

The 7 Vict. c. iii., which received the royal assent on the 10th of May, 1844, by s. 48, after reciting the 175th section of the 5 & 6 W. 4, c. cvii., as to charging the rates and tolls equally, and the 24th section of the 2 Vict. c. xxvii., as to charging the carriage charges equally, and referring to certain sections on similar subjects in the acts relating to the Cheltenham and Great Western Union Railway and the Oxford Railway, and further reciting that it was expedient that the said recited provisions of the said acts relating to the Great Western Railway, as well as the provisions contained in the said sections of the said acts relating to the Cheltenham and Great Western Union Railway, and the Oxford Railway, respectively, should be amended, and that the provisions applicable to the said three railways should be assimilated, repealed the recited provisions of the said acts relating to the Great Western Railway, and the said provisions contained in the said sections of the acts relating to the Cheltenham and Great Western Union Railway, and to the Oxford Railway.

Section 49 enacted that all tolls for the use of the Great Western Railway, comprising the said Cheltenham and Great Western Union Railway and the said Oxford Railway, and any other railways belonging or under lease to the Great Western Railway Company, should at all times be charged equally to all persons, and after the same rate, whether per mile or per ton per mile, or otherwise, in respect of all passengers, and all goods, animals, or carriages of a like description,

and conveyed or propelled by a like carriage or engine, passing along *the same portion of, and over the same distance along, the said railways, or either of them; and that no reduction or advance [*594 in any such tolls should be made, either directly or indirectly, in favour of or against any particular company or person.

Section 50 enacted that it should be lawful for the Great Western Railway Company, whenever they should act as carriers, or should provide locomotive or steam power, or carriages, for the conveyance of passengers, animals, goods, wares, merchandise, articles, matters, or things, to charge for such locomotive or steam power and carriages such sum (not exceeding certain limits), and that either per ton, or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, as they should think expedient: provided always, that, in whatever way the said charges were made, they should be made equally to all passengers, and to all persons, in respect of all animals, and of all goods, wares, merchandise, articles, matters, and things of a like description and quality, and conveyed in or propelled by a like carriage or engine, passing only over the same portion of, and over the same distance along, the said railways, or either of them, and under the like circumstances; and no reduction or advance in any of such charges should be made partially, either directly or indirectly, in favour of or against any particular company or person.

The Bristol and Exeter Railway, with its branches, was authorized to be made by the 6 W. 4, c. xxxvi., amended and extended by the subsequent acts hereinafter mentioned.

That act, which received the royal assent on the 19th of May, 1836, in ss. 174, 175, 176, 177, 178, 183, 186, and 187, contains provisions as to the rates and tolls to be charged for the use of the railway, and the charges for the carriage of goods thereon, similar to those *contained in the 5 & 6 W. 4, c. cvii., relating to the Great [*595 Western Railway.

By the 1 Vict. c. xxvi., which received the royal assent on the 11th of June, 1838, the 6 W. 4, c. xxxvi., was amended; and, in s. 30, certain provisions were made for charging all persons equally for the carriage of goods on the Bristol and Exeter Railway.

By the 3 Vict. c. xlvii., which received the royal assent on the 19th of May, 1840, the Bristol and Exeter Railway acts were further amended; and s. 16 authorized, with certain restrictions, a lease of the Bristol and Exeter Railway, and the works connected therewith, to the Great Western Railway Company, and gave, during the continuance of any such lease, the powers, privileges, and authorities of the said Bristol and Exeter Railway Company, or the directors thereof, or their officers, agents, or servants, to the Great Western Railway Company, and the directors thereof, their officers, agents, and servants.

Section 28 repealed the enactment of 1 Vict. c. xxvi., s. 30, as to the charging all persons equally for the carriage of goods on the Bristol and Exeter Railway; and section 29 enacted, that the charges by the said acts, or either of them, authorized to be made for the carriage of any passengers, goods, animals, or other matters or things, to be conveyed by the Bristol and Exeter Railway Company, or for the use of any steam power or carriage to be supplied by the said company, should be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line only, *and under the same circumstances*; and no reduction or advance in any charge for conveyance by the said company for the use of any *596] locomotive power to be *supplied by them, should be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the same portion of the said railway as aforesaid.

Under and within the powers of the 3 Vict. c. xlvii., s. 16, and in accordance with the restrictions thereof, the Bristol and Exeter Railway Company, on the 3d of November, 1840, granted a lease of the Bristol and Exeter Railway and works connected therewith, to the Great Western Railway Company, for a term of years which continued beyond the 1st of June, 1846; and the Great Western Railway Company, with the approbation required by the act, and under and within the powers thereby given, and in accordance with the restrictions thereof, entered into and accepted such lease, and worked the Bristol and Exeter Railway under such lease during the term aforesaid.

By the 4 & 5 Vict. c. xli., which received the royal assent on the 21st of June, 1841, the Bristol and Exeter Railway Company's acts were further amended; and s. 4, after referring to the lease by the Bristol and Exeter Railway Company of their railway to the Great Western Railway Company, enacted that the said Bristol and Exeter Railway, or so much thereof as should at any time be under lease to the Great Western Railway Company, should, during the period of such lease, be subject to all such and the same powers and provisions with regard to the management of the traffic, and the working and protection thereof, as were contained in the several acts relating to the Great Western Railway, with regard to the management of the traffic, working, and protection of such last-mentioned railway; and the said Great Western Railway Company might, from time to time, delegate to their directors (or any particular number of them) all or any of such powers; and the said directors to whom such powers might be so delegated, might *597] *lawfully exercise the same in like manner as they might do if the said Bristol and Exeter Railway were part of the Great Western Railway, and had been originally made subject to such powers and pro-

visions: provided always that nothing in that act contained should impeach or prejudice any or either of the clauses, provisions, and agreements, contained in the lease granted by the Bristol and Exeter Railway Company to the Great Western Railway Company, under the provisions of the said last-recited act (3 Vict. c. xlvii.).

The whole of the several statutes above mentioned were to be taken as part of the case, as if the same had been fully set out.

The Great Western Railway Company completed and opened so much of the Great Western Railway, and branches connected therewith, as is material to the decision of this case, before May, 1844, and were during the whole of the years 1844, 1845, and 1846, common carriers thereon, and on the Bristol and Exeter Railway, including the stations hereinafter mentioned. The whole of the above railways and branches are treated throughout this case as the railway of the Great Western Railway Company; and such railway, when mentioned, is to be understood as including all such parts and branches as were respectively at the times in question completed and opened. The Great Western Railway Company, during the period in question, were the only carriers on the said railway, and always found and conducted the carriages and engines used thereon for the carriage of passengers and goods. If any other carrier wanted goods carried on the railway, he was practically obliged to, and did, employ the company for that purpose.

The carriage of goods by the railway was found so much quicker, better, and cheaper, than carriage by the old common roads, that the individuals who acted as *common carriers found it necessary to [*598 their business to employ the company to carry for them on the railway whenever the intended journey of the goods could be performed wholly or principally by the railway.

From the year 1841, down to his bankruptcy, Parker continually employed the said company, as carriers, to carry goods for him on their railway; and, during that period, they carried for him a very large amount of goods, he being the largest carrier on the line.

Throughout the time to which this case relates, the company were employed by other carriers as well as Parker, and also by the public at large (by which is meant tradesmen, merchants, and others, not carriers), to carry goods along the railway. The course of dealing between the company and Parker was the same as that between the company and other carriers.

When any person not a carrier brought goods to the company to be carried, he was required to furnish the company with a note in writing of the names and addresses of the consignee or consignees, and the contents of the packages. If the person bringing the goods was not furnished with such a note, and could not conveniently make one out, the company's clerks would do so, on being supplied with the requisite information; and the note so made out was always required to be signed by

the person bringing the goods. The company, in such case, ascertained the weights for themselves; but persons not carriers, when they sent a note of the particular of the goods, frequently stated in it the weights.

The carriers who employed the company were supplied by them with printed forms, to be filled up, and delivered with the goods sent to be carried. These forms, which were called indiscriminately ticking-off notes, and carriers' declarations of goods (though the former was the more common title), underwent some variations at different times. The *599] forms principally in *use during the period referred to in the case, were required to be filled up by the carrier, at the head thereof, with the date of the delivery of the goods to the company, with the name of the carrier employing the company to carry, with either the railway station, or nearest place of business of the carrier, from or to which the goods were going, and with the particular railway train by which the goods were to be conveyed. The body was divided into six columns: the first, a double column for the ticking off outwards and inwards, which was filled up by the company's servants, as those tickings-off took place. The second and third columns were for the name and address of the ultimate consignee of each package or parcel, that is to say, not of the person to whom the company were to deliver the package, but of the person to whom the carrier or his agent would have to deliver the same, after the company had carried and delivered the same to the carrier or his agent; the fourth and fifth columns were for the description and contents of the packages; and the sixth column was for the weights. The company required the second and subsequent columns to be filled up by the carriers; and this requisition, with occasional exceptions, attributable to accident or inadvertence, was complied with. A blank was not unfrequently left in the column, for the contents of the package; and sometimes in that for the address of the ultimate consignee; and an address of the most general description (as London) was often inserted.

Although it was by far the more usual practice to make a separate entry of each package, yet it not unfrequently happened that two or more packages, such as three hampers, or two boxes, going to the same ultimate consignee, were entered in one line, as though they had composed but one package. The ticking-off note, or carrier's declaration, was signed by the carrier as consignor. At the foot, below such signature, there were *600] blanks, to be filled up with the names of the company's clerks receiving and checking the goods, and the numbers of the railway trucks by which they were sent. There were also columns for a summary of the weights, and the company's charges. All goods delivered by the carriers to the company, were accompanied by one of these ticking-off notes; and the clerks of the company, having satisfied themselves of its correctness, and ticked off the different packages in the "outward" division of the ticking-off column, filled up the

summary of the company's charges, and transmitted the ticking-off notes so filled up to the station of delivery.. At this station, on the goods being delivered to the carriers, they were ticked off by the company's servants in the "inwards" division of the ticking-off column, and the ticking-note remained in the possession of the company.

For some time, the company used to deliver to the carriers a copy of the ticking-off notes, including the company's charges; but, since the beginning of August, 1845, they gave them only a general receipt for the goods. In some of the ticking-off, or declarations of goods, instead of the second and third columns above mentioned, was one wide column for the name and residence of the ultimate consignee; and, beyond the column for weights, there was a column for remarks; and that which at the foot of the note, in some instances, was styled "summary, and company's charges," was in others intituled "classification, and company's charges." But the import of the note, as far as relates to any of the matters in question, was not regarded by any of the parties concerned as at all varied by the variations in the forms.

Specimens of these ticking-off notes are more particularly referred to under the several heads of claim to which they relate. Any figures appearing in the column for "remarks," were added by the company's servants.

*The goods which Parker employed the company to carry, as mentioned in this case, were never Parker's own goods, but goods [*601 belonging to third persons, who employed Parker to carry them; and Parker, after carrying them to the company's station, then employed the company to carry them on their railway to the station nearest to, or most convenient for, the place at which Parker was to deliver them, and to deliver them at such station to Parker's agent, who then carried them the remainder of the journey in Parker's own vehicles, and delivered them to the ultimate consignees: as, for example, Parker was employed to carry from London to Reading; he carried from London to the Paddington station, and employed the company to carry from thence to the Reading station, whence he carried into the town of Reading: so (before the line of railway was open to Oxford), Parker was employed to carry from Oxford to London; he carried to the Steventon station, and employed the company to carry thence to the Paddington station, whence he carried into London. On all occasions when the company so carried goods for Parker, they received the goods from Parker, or his agent, only; and, at the end of the journey on the railway, delivered them to Parker, or his agent, only; and treated and dealt with him as both the consignor and consignee of the goods. They received payment for the carriage, of him only, and never recognised, or delivered to, any other person than Parker, or dealt with, or followed any orders from, the persons who employed Parker to carry the goods. Parker only, and not the company, had any contracts or dealings with the persons so

employing him to carry the goods. These persons always paid Parker, and not the company, for the carriage. Parker, like other carriers, generally made a profit on the transaction; and, in case of loss, or of damage to the goods, Parker, and not the company, made satisfaction *602] for the same to *the persons employing Parker, and Parker received satisfaction from the company. The company, although they treated Parker alone, both as consignor and consignee, required to be, and generally were, informed by the ticking-off notes of the names and addresses of the ultimate consignees, or those persons to whom the goods were to be delivered by Parker. The names and addresses of these ultimate consignees were also in the majority of cases written on the packages. The names and addresses of the primary consignors, or the persons from whom Parker received the goods to carry, were altogether unknown to the company. The other carriers from whom the company received goods, dealt with the company and their own employers in the same manner and on similar terms.

Scales of charges fixed by the company for the carriage of goods by them on their said railway, were published, in printed bills issued by the company from time to time,—two of which bills, marked respectively A. and B., were annexed to the case. These two bills were in operation during the whole of the time to which this case relates; bill A. coming into operation at the commencement of that time, and so continuing until the 24th of March, 1845, when bill B. came into operation, and so continued until the end of the time. After bill B. came into operation, bill A. ceased to be acted on.

The first scale of charges in each of the said bills was commonly called the “Parcels” scale; such scale relating, in bill A., to packages up to 2 cwt., and in bill B. to packages up to 3 cwt. The second scale in each bill was commonly called the “Tonnage” scale; the charges therein specified for the carriage of goods, being the charges per ton.

During the time in question, no other bills were issued or in operation; nor were any other announcements of charges made. Any deviation from these bills *that may have taken place, was unautho- *603] rized by any formal minute, or written sanction or order of the board of directors; but the board of directors were from time to time informed by their manager of the charges which are the subject of complaint in this case, and assented to them, and to the receipt of the money paid under them; which money was regularly carried to the account of the company, and formed part of the company’s general funds.

The rates of charge fixed by the company, and charged for the carriage of goods on the said railway *from* the respective country stations mentioned in the said bills, to Paddington, were the same as the rates stated in the said bills, from Paddington to such country stations.

The expressions, "aggregate of one kind," and "aggregate of one kind or class," in the said bills A. and B., have no technical signification.

The charges which are in dispute in this case, except so far as the fifth head of claim is concerned, relate to packages not exceeding 500lbs. weight each; and the greater part of them relate to packages not exceeding the respective weights of 2 cwt. and 3 cwt., whilst bills A. and B. were respectively in operation.

When any of the public,—such as a tradesman or other person not a carrier,—whilst bill A. was in operation, sent at the same time several packages of a different kind (that is, containing different kinds of goods) singly, not exceeding 2 cwt., but which taken collectively exceeded that weight, or were accompanied by some larger package of a different kind, from the same person, he was, during the first six weeks from 1st of May, 1844, charged for them, according to the tonnage-scale, as miscellaneous, or belonging to the sixth class (that is, at the highest tonnage-rate, with the addition of 2*d.* a package); so also, if, during the same period, one package not *exceeding 2 cwt. was sent, [*604 together with another of a different kind exceeding that weight, the smaller package was charged at the miscellaneous rate. If several packages, all of the same kind, so sent together, exceeded 2 cwt., they were all charged as one package, at the rate of the class to which from the nature of the goods they belonged.

After the first six weeks from 1st of May, 1844, the miscellaneous class was not applied to the public, other than carriers; but such public were charged for the whole of the packages together, either at the rate of the class to which the whole or the principal part of the articles belonged, or a rough average was made of the classes to which the goods belonged, and the charge was determined accordingly. As, for example, if nine-tenths, or thereabouts, of the weight belonged to the second class, and one-tenth, or thereabouts, to either the first, or the third, or any other class, they would all be charged as belonging to the second; or, if one-half, or thereabouts, belonged to the second class, and the other half, or thereabouts, to the fourth class, the whole would be charged as of the third class.

But, when Parker, or any other carrier, during any part of the time when bill A. was in operation, sent at the same time several packages singly, not exceeding 2 cwt., but which taken collectively exceeded that weight, or were accompanied by any larger package sent by him, he was charged for them according to the tonnage-scale, as miscellaneous, or belonging to the sixth class (that is, at the highest tonnage-rate, with an additional 2*d.* for each package); and this without reference to the nature of the goods, or the class to which each individual package might belong. If, however, two or more of the packages carried for Parker were for the same ultimate consignee, ther

such packages were charged as miscellaneous, or otherwise, according to the same circumstances* as would have regulated the charges had they been carried for any one of the public, not a carrier, during the six weeks when the miscellaneous class was applied to the public.

In a similar way, during the time bill B. was in operation, when any of the public, other than a carrier, sent at the same time several packages of goods singly, not exceeding 3 cwt., but which accompanied some larger package sent by the same person, or which, taken collectively, exceeded the weight of 3 cwt., such packages were charged for as belonging to one of the first four classes,—either to that to which the whole or the principal part of the goods sent by the same person at the same time belonged, or to some average class, as before described. But, when Parker, or any other carrier, whilst bill B. was in force, sent several packages of goods singly, not exceeding 3 cwt., but accompanying some larger packages sent by him, or, when taken collectively, exceeding 3 cwt., he was charged for them, according to the tonnage-scale, as miscellaneous, or belonging to the fifth or miscellaneous tonnage class (that is, at the highest tonnage-rate, with an additional 2*d.* on every package not exceeding 2 cwt.); and this without reference to the nature of the goods, or the class to which each individual package might belong. If, however, any two or more packages sent at the same time by Parker, or any other carrier, were going to the same ultimate consignee, and their joint weights exceeded 3 cwt., they were not necessarily charged as of the miscellaneous class, but as of that class to which from the nature of the goods they would belong; in the same manner as if they had been sent by the consignee himself, without the intervention of a carrier.

The miscellaneous class in bill B. was never applied to the public at large.

*The above mode of charging gave rise to the first and second heads of claim hereinafter mentioned.

The charge of the miscellaneous or highest class rate for goods sent by carriers was extended in many cases to packages exceeding 2 cwt and 3 cwt., but not exceeding 500lbs. During the time bill A. was in operation, such charge was made on every package which, taken by itself, did not exceed the weight of 500lbs., though exceeding 2 cwt., if it was unaccompanied by a package of the same kind going to the same ultimate consignee. Hence arose the third head of claim hereinafter mentioned.

A somewhat similar distinction between the public and carriers to that above stated with respect to goods falling within the tonnage-scale, was also made with respect to goods falling within the “parcels” scale; that is, with respect to packages which collectively did not exceed 2 cwt. and 3 cwt. respectively, when bills A. and B. were respectively in operation, and which were unaccompanied by any larger package. When

one of the public, not a carrier, sent such packages, he was, after the first six weeks from the 1st of May, 1844, simply charged, upon the aggregate weight of the packages, the amount indicated by the "parcels" scale. During those six weeks, he was charged 2*d.* a package, in addition, if the packages were of a different kind; but a carrier, if the packages, whether of the same or a different kind, were going to different ultimate consignees, was charged the additional 2*d.* a package, as well after as during those six weeks. This was whilst bill A. was in operation, in which there is no division of the "parcels" scale into classes: but, when bill B. came into operation, the packages sent by a carrier, if going to different ultimate consignees, were, without reference to the class to which the particular goods might belong, charged at the rate of the highest class in the "parcels" scale, with the addition of 2*d.* a package. The public, other than carriers, [*607] were not charged the 2*d.* a package; and the class of their goods was determined by the nature of the goods: and, if the goods belonged to different classes, they were paid for as belonging to the class of the principal part, or a rough average was made, as before described.

As, however, Parker's goods, when they collectively did not exceed 3 cwt., during the time bill B. was in operation, generally belonged to the fourth class in the "parcels" scale, the dispute between the parties in respect of goods falling within the "parcels" scale, is confined to the charge of the additional 2*d.* a package; and this constitutes the fourth head of claim hereinafter mentioned.

The charge of 2*d.* a package, both in the case of goods falling within the parcels-scale, and that of goods falling within the tonnage-scale, was only made when the packages so chargeable exceeded one in number.

In cases where the company carried for Parker, or any other carrier, several packages (whether of the weight in question, or any other weights), which belonged or were going to several different ultimate consignees, the company were put to no more labour, expense, or trouble, than when the packages belonged to, or were to be delivered by, Parker, or any other carrier, to one and the same ultimate consignee; nor did the company incur any more risk, except such as necessarily arises (if any arise) from the mere fact of the packages belonging to several owners, instead of to one owner.

It does not appear that any action has ever been brought against the company by any of the carriers' customers for loss of or damage to goods intrusted by such customer to a carrier.

When tradesmen and others, not being carriers, have sent (as they frequently have sent during the time in *question) by the railway consignments comprising several packages, to their several [*608] customers, and on which such tradesmen paid the company's charges, the company never made any extra charge on account of any increased risk arising from the circumstance of the several packages belonging

to different owners. In all cases, however, in which the packages were to be delivered to several consignees, such tradesmen by whom they were sent not paying the company's charges as aforesaid, such packages were charged separately, and not on the aggregate weight.

The labour, trouble, expense, and risk to the company were in no respect greater in or about the carriage for Parker, or any other carrier, of goods consisting of several packages (whatever their respective weights) going to different ultimate consignees, than the labour, trouble, expense, and risk in or about the carriage of the same goods for a tradesman, or other person not a carrier, supposing, as before, such goods to be going to different consignees.

The carriers were not mere customers of the company; but also rivals in business; inasmuch as, if each customer of the carrier were to bring his goods direct to the company to be carried for him, the profit to the company and the charge to the customers (each of whom would be charged for his own goods separately) would be greater than the charge by the company to the carrier. The carriers do not generally, nor did they during the time in question, diminish their charge to a customer for the carriage of a parcel on a particular occasion, simply because on such occasion they might happen to have other similar parcels going the same journey at the same time for other customers, such journey being within the regular and accustomed journey to the carrier.

The carriers afforded to the company, in loading and unloading the goods which they employed the company to carry, much greater assistance than was afforded to *the company by tradesmen, or others,
 *609] not carriers, in loading the goods sent by them.

Before and during the period from the 1st of May, 1844, to the end of May, 1846, Parker made frequent complaints to the company, of their charges being excessive, unequal, and illegal; and paid the several charges to which this case relates, under the following protest, which was constantly repeated:—"I demand that the goods be charged, in the respective classes to which they belong, at the tonnage-rate according to the printed scale of charges. Also I demand the discount of 10 per cent." All the payments were made unwillingly, and were necessary, in order to procure the carriage of the goods on the railway, and the delivery of them to Parker, when so carried.

The payments were made, in each case, either on the delivery of the goods to the company to be carried, or at the time of the delivery of the goods to Parker, when carried. If the payments had not been so made, the company, as Parker knew, would either not have allowed the goods to be carried on the railway, or, when they had been carried, would not have allowed them to be delivered to him. The carriage of the goods on the railway, and their delivery to Parker when so carried,

was, for practical purposes, essential to the carrying on of his business of carrier.

Parker became bankrupt in March 1857 and a fiat in bankruptcy issued against him on the 21st of that month. The plaintiffs were duly appointed assignees.

After the appointment of the assignees a writ of mandamus was issued for the return of one calendar month before the 1st of October 1857, at the 27th of October, 1857. Notice of action was duly served on the company by the plaintiffs. The notice of action and particulars of demand were sufficient in respect of the alleged overcharges set forth under the first four heads of claim. [*610]

First Head of Claim.

1. On the 5th of May, 1857, before the passing of 7 Vict. c. iii., bill A. being then in operation, and the maximum class being applied to the public, Parker delivered to the company, at their station at Taunton, the packages of goods hereinafter more specified, weighing altogether 18 cwt. 3 qrs. 4 lbs. accompanied by the usual ticking-off note, declaring correctly, in the proper columns, the names and addresses of the ultimate consignees and the description, contents, and weight of the packages, in the manner following:—

Name, &c. of consignee.	Description of packages, &c.	Contents.	Cwt.	Qrs.	Lbs.
Bonsor, Newgate Market	1 Hamper . .	Meat	1	0	23
Bonsor, do.	1 Hamper . .	Meat	4	0	10
Bonsor, do.	1 Hamper . .	Meat	0	0	0
Bonsor, do.	1 Hamper . .	Meat	0	1	0
Frost & Co. do.	1 Hamper . .	Meat	2	0	0
Bonsor, do.	1 Hamper . .	Meat	0	1	10
Coles, London	Cloth	Meat	1	1	19
			10	0	0

The above goods were so delivered at the same time, to be carried together by the company on their railway from the Taunton station to the Paddington station, and to be there delivered together to Parker. The company received and carried such goods accordingly, and charged Parker for so doing 2l. 5s. 11d., which he paid under the before mentioned protest, and was obliged to pay, in order to procure the carriage and delivery of the goods.

*611] *The plaintiffs contend that Parker was entitled to have the above goods charged at the aggregate weight of 18 cwt. 3 qrs. 9 lbs., at the rate of the fifth class of goods in the tonnage-scale of bill A., in which class meat is specified, and which rate, from Paddington to Taunton, was 48s. a ton, and was the same as the rate paid for carriage from Taunton to Paddington, at which rate the charge for the carriage of the said goods would have been 2l. 5s. 2d.; and the plaintiffs allege the difference between that sum and 2l. 5s. 11d. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on the aggregate weight, owing to the character of the goods themselves; and, independently of other objections to such obligation, they allege, that, except where the weight of several packages of the same kind of goods, going to some one ultimate consignee, exceeded 2 cwt., the goods, being sent by a carrier, were to be charged in the miscellaneous class, and, accordingly, that the company had a right to charge, as they had charged, 2l. 5s. 11d., which is made up thus:—

	£	s.	d.
Meat (including all that was going to Bonsor), 15cwt. 1 qr. 25lbs., at fifth class rate, or 48s. a ton	1	17	4
Miscellaneous, 3 cwt. 1 qr. 12 lbs., at sixth class rate, or 52s. a ton	0	8	3
2 Parcels, at 2d. each	0	0	4
	<hr/>		
	2	5	11

2. On the 2d of January, 1845, after the passing of 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class not being applied to the public, other than carriers, Parker delivered to the company, in a similar way, exactly similar goods to those last mentioned, similarly declared in the ticking-off note accompanying them, to be carried on the same journey, and delivered to him as before. The company carried them as on the *former occasion, and charged *612] him the same sum as on that occasion; which he paid, as then, under protest, and upon the same compulsion. The plaintiffs claim to recover the same overcharge as on the former occasion, upon the same grounds. The company justify their charge as on the former occasion; and they further contend that they were not limited as to the charge made to Parker, or other carriers, by the charges made to tradesmen, or persons not carriers; as they allege that the goods were not in such cases carried *under the like circumstances*.

3. On the 6th of May, 1844, before the passing of 7 Vict. c. iii., bill A. then being in operation, and the miscellaneous class being applied to the public, Parker delivered to the company, at their station at Steventon, the packages of goods hereinafter next specified, weighing altogether 3 cwt. 2 qrs. 4 lbs., accompanied with the usual ticking-off note, declaring correctly, in the proper columns, the names and ad

dresses of the ultimate consignees in the respective parcels and weight of the packages in the respective parcels —

Name	Address	Contents	Quantity	Wt.	Qrs.	Lbs.
Wilcox	Keegan Market.	2 Hamper . .	Meat	2	3	10
Jennings . . .	do.	2 Hamper . .	Meat	1	0	22
Worley	do.	2 Parcels	Butter	0	2	0
				3	2	4

The above goods were so delivered at the same time, to be carried together by the company on their railway from the Steventon station to the Paddington station and to be there delivered together to Messrs.

The company received and carried such goods accordingly, and Messrs. Parker for so doing 4s. 9d., which he paid under similar circumstances, and was obliged to pay, in order to procure the carriage and delivery of the goods.

The plaintiffs contend that Parker was entitled to be charged for the aggregate weight of 3 cwt. 2 qrs. 4 lbs., at the rate of 18s. a ton of goods in the tonnage-scale of bill A., in which clause goods such as fresh butter are specified, and which rate, from Paddington to Steventon was 18s. a ton, and was the same as the rate from Steventon to Paddington, at which rate the carriage for the aggregate of the said goods would have been 3s. 2d.; and the plaintiffs claim the difference between that sum and 4s. 9d. to be an amount payable by the company to recover.

On the other hand, the company contends that they were not bound to charge these goods on their aggregate weight, but on the weight of the goods, and as they were not of the same kind and independent of other objections to this obligation they were not bound to charge the weight of several packages of the same kind of goods if one ultimate consignee exceeded 2 cwt., the goods of the same kind, if the carrier, were to be charged in the miscellaneous class and not in the specified class, that the company had a right to charge, as they did, at the rate of 4s. 9d., which is made up thus:—

Miscellaneous, 3 cwt. 2 qrs. 4 lbs., at sixth class, 18s. a ton

3 Parcels, at 2d. each

£ 1 1
+ 6 6
+ 0 6
£ 1 8

The company further contend that at all events they were entitled to charge as much as 3s. 5d., which would have been no more than paid to any tradesman, or other persons not a carrier, and no more than paid

goods on the same occasion, to be carried by the company on the same
 *614] journey, since the miscellaneous class was, in *May 1844, applied,
 to the public, who consequently would have been charged thus:—

	£	s.	d.
Meat, 3 cwt. 0 qrs. 4 lbs., at fifth class, or 18s. a ton	0	2	9
Miscellaneous, 2 qrs. 0 lbs., at sixth class, or 24s. a ton	0	8	8
	<hr/>		
	0	3	5

4. On the 16th of May, 1844, after the passing of the 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class being applied to the public, Parker delivered to the company in a similar way, exactly similar goods to those last mentioned, similarly declared in the ticking-off note accompanying them, to be carried on the same journey, and delivered to him as before. The company carried them, as on the former occasion, charged him the same sum as on that occasion, which he paid them under protest, and upon the same compulsion. The plaintiffs claim to recover the same overcharge as on the former occasion, upon the same grounds. The company justify their charge as on the former occasion: and they further contend that they were not limited as to the charge made to Parker or other carriers, by the charge made to tradesmen or persons not carriers; as they allege that the goods were not in such cases carried "*under the like circumstances.*"

5. On the 1st of July, 1844, after the passing of 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class not being applied to the public other than carriers, Parker delivered to the company, in a similar way, exactly similar packages of goods to those last mentioned, similarly declared in the ticking-off note accompanying them, to be carried on the same journey, and delivered to Parker as before. The company carried them as on the two former occasions, charged him the
 *615] same sum as on those occasions, which he paid, as *then, under
 similar protest, and upon the same compulsion. The plaintiffs claim to recover the same overcharge as on the former occasions, upon the same grounds.

The company justify their charge on the same grounds as on the last previous occasion, except the partial justification arising out of the miscellaneous class being applied to the public at large.

During the whole of the time in which bill A. was in operation, the company were constantly employed by tradesmen and other persons not carriers to carry goods for them on all parts of the said railway. If, on any of the occasions mentioned under this first head of claim, or on any other similar occasion, the company had carried the same packages of goods as those respectively specified under this first head of claim, on the same journey, for a tradesman or other person not a carrier, the respective charges for so doing, instead of 2l. 5s. 11d., 2l. 5s. 11d., 4s. 9d., 4s. 9d., and 4s. 9d. (the respective sums charged to and paid

by Parker), would have been respectively 2*l.* 5*s.* 2*d.*, 2*l.* 5*s.* 2*d.*, 3*s.* 5*d.*, 3*s.* 5*d.*, and 3*s.* 2*d.* only; and, in such case, it would have made no difference, whether, in each instance, the several packages were to be delivered to one consignee or to several consignees, provided such tradesman or other person not a carrier had been the party charged with the carriage. But any other carrier would have been charged the same as Parker.

The goods, whether carried for Parker, or a tradesman, or other person not a carrier, would have been conveyed in and propelled by a like carriage and engine, would have passed only over the same portion of, and over the same distance along, the said railway, *and under the like circumstances, unless the fact of Parker being such carrier, and so carrying on his business as hereinbefore mentioned, renders the circumstances unlike.*

*The charges and mode of charge contended for by the plain- [*616
tiffs under this first head of claim, were fair and reasonable.

There was nothing unfair or unreasonable in the charges or mode of charge adopted by the company towards Parker, as stated under this first head of claim, when considered by themselves, and without reference to the charges and mode of charge adopted towards persons not carriers; and the said charges and mode of charge adopted towards Parker were fair and reasonable, unless, from the circumstances stated in this case, they appear to have been otherwise.

Each of the several alleged overcharges stated under this first head of claim, is an instance of a numerous class, out of which it is selected for the purpose of ascertaining the opinion of the court; so that, in pursuance of the order of nisi prius, the amount, if any, recoverable by the plaintiffs, may be assessed in conformity with such opinion.

The first question for the opinion of the court, is, whether the company were justified in charging Parker in the mode above stated, in the instances above stated; and, if not, whether the mode of charge, contended for by the plaintiffs, or what other mode of charge, is the proper one; and whether the plaintiffs are entitled to recover the amounts above claimed as overcharges, or any, and, if any, what part thereof; and, if they are so entitled, whether the same can be recovered in this action.

Second Head of Claim.

1. On the 24th June, 1845, bill B. being then in operation, 100 packages of goods hereinafter next specified, weighing altogether 11 tons, accompanied by the usual ticking-off note, containing correctly (in the proper columns) the names of the ultimate consignees, and the description, contents, and weight of the packages in the manner following:—

Name, &c., of consignee.	Description of package.	Contents.	Cwt.	Qrs.	Lbs.
Raymond	2 Bales	Bacon	4	1	0
Barringer	1 Bale	ditto	2	0	0
Ray	2 Bales	ditto	4	3	0
			11	0	0

The above goods were so delivered, all at the same time, to be carried together by the company on the said railway from the Chippenham station to the Paddington station, and to be there delivered together to Parker.

The company received and carried such goods accordingly, and charged Parker for so doing 10s., which he paid under similar protest, and was obliged to pay, in order to procure the carriage and delivery of the goods.

The plaintiffs contend that Parker was entitled to have the above goods charged on the aggregate weight of 11 cwt. at the rate of the second class of goods in the tonnage-scale of the said bill B., in which class bacon was specified, at which rate, from Paddington to Chippenham, was 16s. a ton, and was the same as the rate fixed from Chippenham to Paddington; at which rate the charge for the carriage of the said goods would have been 8s. 10d.; and the plaintiffs allege the difference between that sum and 10s. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on the aggregate weight; and, independently of other objections to such obligation, they allege, that, except where the *618] weight of the same kind of goods going to some one* ultimate consignee exceeded 3 cwt., the goods, being sent by a carrier, were to be charged in the miscellaneous, or fifth class; and, accordingly, that the company had a right to charge, as they had charged, 10s., which is made up thus:—

	£	s.	d.
Bacon, 9 cwt., at second class, or 16s. a ton	0	7	2
Miscellaneous, 2 cwt., at fifth class, or 28s. a ton	0	2	10
	0	10	0

The company also contend that they were not limited, as to the charge made to Parker or other carriers, by the charge made to tradesmen and other persons not carriers; as they allege that the goods were not in such cases carried *under the like circumstances*.

2. On the 22d of June, 1845, bill B. being then in operation, Parker

delivered to the company at their station at Taunton, the packages of goods hereinafter next specified, weighing altogether 6 cwt. 1 qr. 26 lbs., accompanied by the usual ticking-off note, declaring correctly, in the proper columns, the names and places of residence of the ultimate consignees, and the description, contents, and weight of the packages, in the manner following:—

Name, &c., of consignee.	Description of packages.	Contents.	Cwt.	Qrs.	Lbs.
Pawley, London	1 Keg	Butter	0	2	14
Bonsor, ditto	1 Hamper	Meat	2	3	24
Bonsor, ditto	1 Hamper	Meat	2	3	8
Channing, ditto	1 Basket	Butter	0	0	8
			6	1	26

The above goods were so delivered all at the same time, to be carried together by the company on the said *railway from the Taunton station to the Paddington station, and to be there delivered [*619 together to Parker.

The company received and carried the said goods accordingly, and charged Parker for so doing 14s. 3d., which he paid under similar protest, and was obliged to pay in order to procure the carriage and delivery of the goods.

The plaintiffs contend that Parker was entitled to have the above goods charged on the aggregate weight of 6 cwt. 1 qr. 26 lbs., at the rate of the fourth class of goods in the tonnage-scale of the said bill B., in which class meat and fresh butter are both specified, and which rate, from Paddington to Taunton, was 41s. a ton, and was the same as the rate fixed from Taunton to Paddington, at which rate the charge for the carriage of the said goods would have been 13s. 4d.: and the plaintiffs allege the difference between that sum and 14s. 3d. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on the aggregate weight, both from the nature of the goods, and as they were not of the same kind: and, independently of all other objection to such obligation, they allege, that, except where the weight of the same kind of goods going to some one ultimate consignee exceeded 3 cwt., the goods, being sent by a carrier, were to be charged in the miscellaneous, or fifth class; and, accordingly, that the company had a right to charge, as they have charged, 14s. 3d., which is made up thus:—

to different owners. In all cases, however, in which the packages were to be delivered to several consignees, such tradesmen by whom they were sent not paying the company's charges as aforesaid, such packages were charged separately, and not on the aggregate weight.

The labour, trouble, expense, and risk to the company were in no respect greater in or about the carriage for Parker, or any other carrier, of goods consisting of several packages (whatever their respective weights) going to different ultimate consignees, than the labour, trouble, expense, and risk in or about the carriage of the same goods for a tradesman, or other person not a carrier, supposing, as before, such goods to be going to different consignees.

The carriers were not mere customers of the company; but also rivals in business; inasmuch as, if each customer of the carrier were to bring his goods direct to the company to be carried for him, the profit to the company and the charge to the customers (each of whom would be charged for his own goods separately) would be greater than the charge by the company to the carrier. The carriers do not generally, nor did they during the time in question, diminish their charge to a customer for the carriage of a parcel on a particular occasion, simply because on such occasion they might happen to have other similar parcels going the same journey at the same time for other customers, such journey being within the regular and accustomed journey to the carrier.

The carriers afforded to the company, in loading and unloading the goods which they employed the company to carry, much greater assistance than was afforded to the company by tradesmen, or others,
 *609] not carriers, in loading the goods sent by them.

Before and during the period from the 1st of May, 1844, to the end of May, 1846, Parker made frequent complaints to the company, of their charges being excessive, unequal, and illegal; and paid the several charges to which this case relates, under the following protest, which was constantly repeated:—"I demand that the goods be charged, in the respective classes to which they belong, at the tonnage-rate according to the printed scale of charges. Also I demand the discount of 10 per cent." All the payments were made unwillingly, and were necessary, in order to procure the carriage of the goods on the railway, and the delivery of them to Parker, when so carried.

The payments were made, in each case, either on the delivery of the goods to the company to be carried, or at the time of the delivery of the goods to Parker, when carried. If the payments had not been so made, the company, as Parker knew, would either not have allowed the goods to be carried on the railway, or, when they had been carried, would not have allowed them to be delivered to him. The carriage of the goods on the railway, and their delivery to Parker when so carried,

was, for practical purposes, essentially necessary to enable him to carry on his business of carrier.

Parker became bankrupt in March, 1847; and a fiat in bankruptcy issued against him on the 8th of that month, under which the plaintiffs were duly appointed assignees.

After the appointment of the plaintiffs as such assignees, and upwards of one calendar month before this action was brought, viz. on the 27th of October, 1847, notice of action was duly served on the company by the plaintiffs. The notice of action and particulars of demand *were sufficient in respect of the alleged overcharges set forth [*610 under the first four heads of claim.

First Head of Claim.

1. On the 3d of May, 1844, before the passing of 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class being applied to the public, Parker delivered to the company, at their station at Taunton, the packages of goods hereinafter next specified, weighing altogether 18 cwt. 3 qrs. 9 lbs., accompanied by the usual ticking-off note, declaring correctly, in the proper columns, the names and addresses of the ultimate consignees, and the description, contents, and weight of the packages, in the manner following:—

Name, &c., of consignee.	Description of packages, &c.	Contents.	Cwt.	Qrs.	lbs.
Bonsor, Newgate Market	1 Hamper . .	Meat	1	3	23
Bonsor, do.	1 Hamper . .	Meat	4	0	15
Bonsor, do.	1 Hamper . .	Meat	0	3	0
Bonsor, do.	1 Hamper . .	Meat	3	1	5
Frost & Co. do.	1 Hamper . .	Meat	2	0	0
Bonsor, do.	1 Hamper . .	Meat	5	1	10
Coles, London	Cloth	Meat	1	1	12
			18	3	9

The above goods were so delivered at the same time, to be carried together by the company on their railway from the Taunton station to the Paddington station, and to be there delivered together to Parker. The company received and carried such goods accordingly, and charged Parker for so doing 2l. 5s. 11d., which he paid under the before-mentioned protest, and was obliged to pay, in order to procure the carriage and delivery of the goods.

*611] *The plaintiffs contend that Parker was entitled to have the above goods charged at the aggregate weight of 18 cwt. 3 qrs. 9 lbs., at the rate of the fifth class of goods in the tonnage-scale of bill A., in which class meat is specified, and which rate, from Paddington to Taunton, was 48s. a ton, and was the same as the rate paid for carriage from Taunton to Paddington, at which rate the charge for the carriage of the said goods would have been 2l. 5s. 2d.; and the plaintiffs allege the difference between that sum and 2l. 5s. 11d. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on the aggregate weight, owing to the character of the goods themselves; and, independently of other objections to such obligation, they allege, that, except where the weight of several packages of the same kind of goods, going to some one ultimate consignee, exceeded 2 cwt., the goods, being sent by a carrier, were to be charged in the miscellaneous class, and, accordingly, that the company had a right to charge, as they had charged, 2l. 5s. 11d., which is made up thus:—

	£	s.	d.
Meat (including all that was going to Bonsor), 15cwt. 1 qr. 25lbs., at fifth class rate, or 48s. a ton	1	17	4
Miscellaneous, 3 cwt. 1 qr. 12 lbs., at sixth class rate, or 52s. a ton	0	8	3
2 Parcels, at 2d. each	0	0	4
	2	5	11

2. On the 2d of January, 1845, after the passing of 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class not being applied to the public, other than carriers, Parker delivered to the company, in a similar way, exactly similar goods to those last mentioned, similarly declared in the ticking-off note accompanying them, to be carried on the same journey, and delivered to him as before. The company carried them as on the *former occasion, and charged *612] him the same sum as on that occasion; which he paid, as then, under protest, and upon the same compulsion. The plaintiffs claim to recover the same overcharge as on the former occasion, upon the same grounds. The company justify their charge as on the former occasion; and they further contend that they were not limited as to the charge made to Parker, or other carriers, by the charges made to tradesmen, or persons not carriers; as they allege that the goods were not in such cases carried *under the like circumstances*.

3. On the 6th of May, 1844, before the passing of 7 Vict. c. iii., bill A. then being in operation, and the miscellaneous class being applied to the public, Parker delivered to the company, at their station at Steventon, the packages of goods hereinafter next specified, weighing altogether 3 cwt. 2 qrs. 4 lbs., accompanied with the usual ticking-off note, declaring correctly, in the proper columns, the names and ad

dresses of the ultimate consignees, and the description, contents, and weight of the packages, in the manner following:—

Name.	Address.	Description.	Contents.	Cwt.	Qrs.	Lbs.
Wilcox	Newgate Market	1 Hamper . . .	Meat	1	3	10
Jennings . . .	do.	1 Hamper . . .	Meat	1	0	22
Worley	do.	1 Flat	Butter	0	2	0
				3	2	4

The above goods were so delivered at the same time, to be carried together by the company on their railway from the Steventon station to the Paddington station, and to be there delivered together to Parker. The company received and carried such goods accordingly, and charged Parker for so doing 4s. 9d., which *he paid under similar pro- [*613 test, and was obliged to pay, in order to procure the carriage and delivery of the goods.

The plaintiffs contend that Parker was entitled to be charged, on the aggregate weight of 3 cwt. 2 qrs. 4 lbs., at the rate of the fifth class of goods in the tonnage-scale of bill A., in which class both meat and fresh butter are specified, and which rate, from Paddington to Steventon, was 18s. a ton, and was the same as the rate fixed for carriage from Steventon to Paddington, at which rate the charge for the carriage of the said goods would have been 3s. 2d.; and the plaintiffs allege the difference between that sum and 4s. 9d. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on their aggregate weight, both from the nature of the goods, and as they were not of the same kind; and, independently of other objections to this obligation, they allege, that, except when the weight of several packages of the same kind of goods going to some one ultimate consignee exceeded 2 cwt., the goods, being sent by a carrier, were to be charged in the miscellaneous class, and, accordingly, that the company had a right to charge, as they had charged, 4s. 9d., which is made up thus:—

	£	s.	d.
Miscellaneous, 3 cwt. 2 qrs. 4 lbs., at sixth class, or 18s. a ton	0	4	3
3 Parcels, at 2d. each	0	0	6
	0	4	9

The company further contend, that, at all events, they were entitled to charge as much as 3s. 5d., which would have been the amount charged to any tradesman, or other person not a carrier, had he sent the same

goods on the same occasion, to be carried by the company on the same journey, since the miscellaneous class was, in *May 1844, applied, *614] to the public, who consequently would have been charged thus:—

	£	s.	d.
Meat, 3 cwt. 0 qrs. 4 lbs., at fifth class, or 18s. a ton	0	2	9
Miscellaneous, 2 qrs. 0 lbs., at sixth class, or 24s. a ton	0	0	8
	<hr/>		
	0	3	5

4. On the 16th of May, 1844, after the passing of the 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class being applied to the public, Parker delivered to the company in a similar way, exactly similar goods to those last mentioned, similarly declared in the ticking-off note accompanying them, to be carried on the same journey, and delivered to him as before. The company carried them, as on the former occasion, charged him the same sum as on that occasion, which he paid them under protest, and upon the same compulsion. The plaintiffs claim to recover the same overcharge as on the former occasion, upon the same grounds. The company justify their charge as on the former occasion: and they further contend that they were not limited as to the charge made to Parker or other carriers, by the charge made to tradesmen or persons not carriers; as they allege that the goods were not in such cases carried "*under the like circumstances.*"

5. On the 1st of July, 1844, after the passing of 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class not being applied to the public other than carriers, Parker delivered to the company, in a similar way, exactly similar packages of goods to those last mentioned, similarly declared in the ticking-off note accompanying them, to be carried on the same journey, and delivered to Parker as before. The company carried them as on the two former occasions, charged him the *615] same sum as on those occasions, which he paid, as *then, under similar protest, and upon the same compulsion. The plaintiffs claim to recover the same overcharge as on the former occasions, upon the same grounds.

The company justify their charge on the same grounds as on the last previous occasion, except the partial justification arising out of the miscellaneous class being applied to the public at large.

During the whole of the time in which bill A. was in operation, the company were constantly employed by tradesmen and other persons not carriers to carry goods for them on all parts of the said railway. If, on any of the occasions mentioned under this first head of claim, or on any other similar occasion, the company had carried the same packages of goods as those respectively specified under this first head of claim, on the same journey, for a tradesman or other person not a carrier, the respective charges for so doing, instead of 2l. 5s. 11d., 2l. 5s. 11d., 4s. 9d., 4s. 9d., and 4s. 9d. (the respective sums charged to and paid

by Parker), would have been respectively 2*l.* 5*s.* 2*d.*, 2*l.* 5*s.* 2*d.*, 3*s.* 5*d.*, 3*s.* 5*d.*, and 3*s.* 2*d.* only; and, in such case, it would have made no difference, whether, in each instance, the several packages were to be delivered to one consignee or to several consignees, provided such tradesman or other person not a carrier had been the party charged with the carriage. But any other carrier would have been charged the same as Parker.

The goods, whether carried for Parker, or a tradesman, or other person not a carrier, would have been conveyed in and propelled by a like carriage and engine, would have passed only over the same portion of, and over the same distance along, the said railway, *and under the like circumstances, unless the fact of Parker being such carrier, and so carrying on his business as hereinbefore mentioned, renders the circumstances unlike.*

*The charges and mode of charge contended for by the plaintiffs under this first head of claim, were fair and reasonable. [*616]

There was nothing unfair or unreasonable in the charges or mode of charge adopted by the company towards Parker, as stated under this first head of claim, when considered by themselves, and without reference to the charges and mode of charge adopted towards persons not carriers; and the said charges and mode of charge adopted towards Parker were fair and reasonable, unless, from the circumstances stated in this case, they appear to have been otherwise.

Each of the several alleged overcharges stated under this first head of claim, is an instance of a numerous class, out of which it is selected for the purpose of ascertaining the opinion of the court; so that, in pursuance of the order of nisi prius, the amount, if any, recoverable by the plaintiffs, may be assessed in conformity with such opinion.

The first question for the opinion of the court, is, whether the company were justified in charging Parker in the mode above stated, in the instances above stated; and, if not, whether the mode of charge, contended for by the plaintiffs, or what other mode of charge, is the proper one; and whether the plaintiffs are entitled to recover the amounts above claimed as overcharges, or any, and, if any, what part thereof; and, if they are so entitled, whether the same can be recovered in this action.

Second Head of Claim.

1. On the 24th June, 1845, bill B. being then in operation, Parker delivered to the company, at their station at Chippenham, the packages of goods hereinafter next specified, weighing altogether 11 cwt., accompanied by the usual ticking-off note, declaring correctly (in the proper columns) the names of the ultimate consignees, *and the description, contents, and weight of the packages in the manner [*617] following:—

Name, &c., of consignee.	Description of package.	Contents.	Cwt.	Qrs.	lbs.
Raymond	2 Bales	Bacon	4	1	0
Barringer	1 Bale	ditto	2	0	0
Ray	2 Bales	ditto	4	3	0
			11	0	0

The above goods were so delivered, all at the same time, to be carried together by the company on the said railway from the Chippenham station to the Paddington station, and to be there delivered together to Parker.

The company received and carried such goods accordingly, and charged Parker for so doing 10s., which he paid under similar protest, and was obliged to pay, in order to procure the carriage and delivery of the goods.

The plaintiffs contend that Parker was entitled to have the above goods charged on the aggregate weight of 11 cwt. at the rate of the second class of goods in the tonnage-scale of the said bill B., in which class bacon was specified, at which rate, from Paddington to Chippenham, was 16s. a ton, and was the same as the rate fixed from Chippenham to Paddington; at which rate the charge for the carriage of the said goods would have been 8s. 10d.; and the plaintiffs allege the difference between that sum and 10s. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on the aggregate weight; and, independently of other objections to such obligation, they allege, that, except where the *618] weight of the same kind of goods going to some one* ultimate consignee exceeded 3 cwt., the goods, being sent by a carrier, were to be charged in the miscellaneous, or fifth class; and, accordingly, that the company had a right to charge, as they had charged, 10s., which is made up thus:—

	£	s.	d.
Bacon, 9 cwt., at second class, or 16s. a ton	0	7	2
Miscellaneous, 2 cwt., at fifth class, or 28s. a ton	0	2	10
	0	10	0

The company also contend that they were not limited, as to the charge made to Parker or other carriers, by the charge made to tradesmen and other persons not carriers; as they allege that the goods were not in such cases carried *under the like circumstances*.

2. On the 22d of June, 1845, bill B. being then in operation, Parker

delivered to the company at their station at Taunton, the packages of goods hereinafter next specified, weighing altogether 6 cwt. 1 qr. 26 lbs., accompanied by the usual ticking-off note, declaring correctly, in the proper columns, the names and places of residence of the ultimate consignees, and the description, contents, and weight of the packages, in the manner following:—

Name, &c., of consignee.	Description of packages.	Contents.	Cwt.	Qrs.	Lbs.
Pawley, London	1 Keg	Butter	0	2	14
Bonsor, ditto	1 Hamper	Meat	2	3	24
Bonsor, ditto	1 Hamper	Meat	2	3	8
Channing, ditto	1 Basket	Butter	0	0	8
			6	1	26

The above goods were so delivered all at the same time, to be carried together by the company on the said *railway from the Taunton station to the Paddington station, and to be there delivered [*619 together to Parker.

The company received and carried the said goods accordingly, and charged Parker for so doing 14s. 3d., which he paid under similar protest, and was obliged to pay in order to procure the carriage and delivery of the goods.

The plaintiffs contend that Parker was entitled to have the above goods charged on the aggregate weight of 6 cwt. 1 qr. 26 lbs., at the rate of the fourth class of goods in the tonnage-scale of the said R. R., in which class meat and fresh butter are both specified, and which rate, from Paddington to Taunton, was 41s. a ton, and was the same as was fixed from Taunton to Paddington, at which rate the charge for the carriage of the said goods would have been 13s. 4d.: and they allege that the difference between that sum and 14s. 3d. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not obliged to charge these goods on the aggregate weight, both from the nature of the goods, and as they were not of the same kind; and, in support of all other objection to such obligation, they allege, that, except when the weight of the same kind of goods going to some one place did not exceed 3 cwt., the goods, being sent by a consignor, were to be charged in the miscellaneous, or fifth class; and, accordingly, that the company had a right to charge, as they have charged, 14s. 3d., which is made up thus:—

	£	s	d.
Meat (going to Bonsor), 5 cwt. 3 qrs. 4 lbs., at fourth class, or 41s. a ton	0	12	0
Miscellaneous, 2 qrs. 22 lbs., at fifth class, or 48s. a ton	0	1	11
Two parcels, at 2d. each	0	0	4
	0	14	3

*620] *The company also contend that they are not limited, as to their charge made to Parker and other carriers, by the charge made to tradesmen and others, not carriers, as they allege that the goods were not in such cases carried *under the like circumstances*.

During the whole of the time in which bill B. was in operation, the company were constantly employed by tradesmen and other persons, not carriers, to carry goods for them on all parts of the said railway. If, on any of the occasions mentioned under this second head of claim, or on any other occasion whilst bill B. was in operation, the company had carried the same packages of goods as those respectively specified under the second head of claim, on the same journeys, for a tradesman or other person not a carrier, the respective charges for so doing, instead of 10s. and 14s. 3d. (the respective sums charged to and paid by Parker), would have been respectively 8s. 10d. and 13s. 4d. only; and, in such cases, it would have made no difference, whether, in each instance, the several packages were to be delivered to one consignee or several consignees, provided such tradesman or other person not a carrier had been the party charged with the carriage. But any other carrier would have been charged the same as Parker.

The goods, whether carried for Parker or a tradesman or other person not a carrier, would have been conveyed in and propelled by a like carriage and engine, would have passed only over the same portion of, and over the same distance along, the said railway, and under the like circumstances, unless the fact of Parker being such carrier, and so carrying on his business as hereinbefore mentioned, rendered the circumstances unlike.

The charges and mode of charge contended for by the plaintiffs under this second head of claim, were fair and reasonable. There was nothing
*621] unfair or unreasonable *in the charges or mode of charge adopted by the company towards Parker, as stated under this second head of claim, when considered by themselves, or without reference to the charges and mode of charge adopted towards persons who were not carriers; and the said charges and mode of charge adopted towards Parker were fair and reasonable, unless from the circumstances stated in this case they appear to have been otherwise.

Each of the several alleged overcharges stated under this second head of claim, is an instance of a numerous class, out of which it is selected for the purpose of ascertaining the opinion of the court, and so that, in pursuance of the order of nisi prius, the amount, if any,

recoverable by the plaintiffs, may be assessed in conformity with such opinion.

The second question for the opinion of the court, is,—whether the company were justified in charging Parker in the mode under this second head of claim above stated, in the instances above stated; and, if not, whether the mode of charge as contended for by the plaintiffs as above stated, or what other mode of charge, is the proper mode; and whether the plaintiffs are entitled to recover the amounts claimed under this second head as overcharges, or any, and if any, what part thereof, and, if they *are* so entitled, whether the same can be recovered in this action.

Third Head of Claim.

1. On the 22d of July, 1844, bill A. being then in operation, Parker deliveted to the company at their station at Chippenham, the packages of goods hereinafter next specified, weighing altogether 15 cwt. 1 qr. 4 lbs., accompanied by the usual ticking-off note, correctly declaring, in the proper columns, the names and places of residence of the ultimate consignees, and the description, *contents, and weight of the packages, in the manner following:—

Name, &c., of consignee.	Description of package, &c.	Contents.	Cwt.	Qrs.	Lbs.
Raymond, London	3 Bales	Bacon	5	3	0
Marriott, ditto	1 Bale	Bacon	2	1	6
Marshall, ditto	1 Bale	Bacon	2	2	12
Read & Son, ditto	1 Bale	Bacon	2	1	14
Brewer, ditto	1 Bale	Bacon	2	1	0
			15	1	4

The above goods were so delivered at the same time, to be carried together by the company on the said railway, from the Chippenham station to the Paddington station, and to be there delivered together to Parker. The company received and carried the said goods accordingly, and charged Parker for so doing 1*l.* 2*s.* 8*d.*, which he paid under similar protest, and was obliged to pay, in order to procure the carriage and delivery of the goods.

The plaintiffs contend that Parker was entitled to have the ~~above~~ goods charged on the aggregate weight of 15 cwt. 1 qr. 4 lbs. at the rate of the third class of goods in the tonnage-scale of the said bill A, in which class “bacon” is specified; and which rate, from ~~Paddington to~~ Chippenham, was 24*s.* a ton, and was the same as the rate ~~fixed from~~

to different owners. In all cases, however, in which the packages were to be delivered to several consignees, such tradesmen by whom they were sent not paying the company's charges as aforesaid, such packages were charged separately, and not on the aggregate weight.

The labour, trouble, expense, and risk to the company were in no respect greater in or about the carriage for Parker, or any other carrier, of goods consisting of several packages (whatever their respective weights) going to different ultimate consignees, than the labour, trouble, expense, and risk in or about the carriage of the same goods for a tradesman, or other person not a carrier, supposing, as before, such goods to be going to different consignees.

The carriers were not mere customers of the company; but also rivals in business; inasmuch as, if each customer of the carrier were to bring his goods direct to the company to be carried for him, the profit to the company and the charge to the customers (each of whom would be charged for his own goods separately) would be greater than the charge by the company to the carrier. The carriers do not generally, nor did they during the time in question, diminish their charge to a customer for the carriage of a parcel on a particular occasion, simply because on such occasion they might happen to have other similar parcels going the same journey at the same time for other customers, such journey being within the regular and accustomed journey to the carrier.

The carriers afforded to the company, in loading and unloading the goods which they employed the company to carry, much greater assistance than was afforded to *the company by tradesmen, or others,
*609] not carriers, in loading the goods sent by them.

Before and during the period from the 1st of May, 1844, to the end of May, 1846, Parker made frequent complaints to the company, of their charges being excessive, unequal, and illegal; and paid the several charges to which this case relates, under the following protest, which was constantly repeated:—"I demand that the goods be charged, in the respective classes to which they belong, at the tonnage-rate according to the printed scale of charges. Also I demand the discount of 10 per cent." All the payments were made unwillingly, and were necessary, in order to procure the carriage of the goods on the railway, and the delivery of them to Parker, when so carried.

The payments were made, in each case, either on the delivery of the goods to the company to be carried, or at the time of the delivery of the goods to Parker, when carried. If the payments had not been so made, the company, as Parker knew, would either not have allowed the goods to be carried on the railway, or, when they had been carried, would not have allowed them to be delivered to him. The carriage of the goods on the railway, and their delivery to Parker when so carried,

was, for practical purposes, essentially necessary to enable him to carry on his business of carrier.

Parker became bankrupt in March, 1847; and a fiat in bankruptcy issued against him on the 8th of that month, under which the plaintiffs were duly appointed assignees.

After the appointment of the plaintiffs as such assignees, and upwards of one calendar month before this action was brought, viz. on the 27th of October, 1847, notice of action was duly served on the company by the plaintiffs. The notice of action and particulars of demand *were sufficient in respect of the alleged overcharges set forth [*610 under the first four heads of claim.

First Head of Claim.

1. On the 3d of May, 1844, before the passing of 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class being applied to the public, Parker delivered to the company, at their station at Taunton, the packages of goods hereinafter next specified, weighing altogether 18 cwt. 3 qrs. 9 lbs., accompanied by the usual ticking-off note, declaring correctly, in the proper columns, the names and addresses of the ultimate consignees, and the description, contents, and weight of the packages, in the manner following:—

Name, &c., of consignee.	Description of packages, &c.	Contents.	Cwt.	Qrs.	lbs.
Bonsor, Newgate Market	1 Hamper . .	Meat	1	3	23
Bonsor, do.	1 Hamper . .	Meat	4	0	15
Bonsor, do.	1 Hamper . .	Meat	0	3	0
Bonsor, do.	1 Hamper . .	Meat	3	1	5
Frost & Co. do.	1 Hamper . .	Meat	2	0	0
Bonsor, do.	1 Hamper . .	Meat	5	1	10
Coles, London	Cloth	Meat	1	1	12
			18	3	9

The above goods were so delivered at the same time, to be carried together by the company on their railway from the Taunton station to the Paddington station, and to be there delivered together to Parker. The company received and carried such goods accordingly, and charged Parker for so doing 2*l.* 5*s.* 11*d.*, which he paid under the before-mentioned protest, and was obliged to pay, in order to procure the carriage and delivery of the goods.

*611] *The plaintiffs contend that Parker was entitled to have the above goods charged at the aggregate weight of 18 cwt. 3 qrs. 9 lbs., at the rate of the fifth class of goods in the tonnage-scale of bill A., in which class meat is specified, and which rate, from Paddington to Taunton, was 48s. a ton, and was the same as the rate paid for carriage from Taunton to Paddington, at which rate the charge for the carriage of the said goods would have been 2l. 5s. 2d.; and the plaintiffs allege the difference between that sum and 2l. 5s. 11d. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on the aggregate weight, owing to the character of the goods themselves; and, independently of other objections to such obligation, they allege, that, except where the weight of several packages of the same kind of goods, going to some one ultimate consignee, exceeded 2 cwt., the goods, being sent by a carrier, were to be charged in the miscellaneous class, and, accordingly, that the company had a right to charge, as they had charged, 2l. 5s. 11d., which is made up thus:—

	£	s.	d.
Meat (including all that was going to Bonsor), 15cwt. 1 qr. 25lbs., at fifth class rate, or 48s. a ton	1	17	4
Miscellaneous, 3 cwt. 1 qr. 12 lbs., at sixth class rate, or 52s. a ton	0	8	3
2 Parcels, at 2d. each	0	0	4
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	2	5	11

2. On the 2d of January, 1845, after the passing of 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class not being applied to the public, other than carriers, Parker delivered to the company, in a similar way, exactly similar goods to those last mentioned, similarly declared in the ticking-off note accompanying them, to be carried on the same journey, and delivered to him as before. The company carried them as on the *former occasion, and charged *612] him the same sum as on that occasion; which he paid, as then, under protest, and upon the same compulsion. The plaintiffs claim to recover the same overcharge as on the former occasion, upon the same grounds. The company justify their charge as on the former occasion; and they further contend that they were not limited as to the charge made to Parker, or other carriers, by the charges made to tradesmen, or persons not carriers; as they allege that the goods were not in such cases carried *under the like circumstances*.

3. On the 6th of May, 1844, before the passing of 7 Vict. c. iii., bill A. then being in operation, and the miscellaneous class being applied to the public, Parker delivered to the company, at their station at Steventon, the packages of goods hereinafter next specified, weighing altogether 3 cwt. 2 qrs. 4 lbs., accompanied with the usual ticking-off note, declaring correctly, in the proper columns, the names and ad

dresses of the ultimate consignees, and the description, contents, and weight of the packages, in the manner following:—

Name.	Address.	Description.	Contents.	Cwt.	Qrs.	Lbs.
Wilcox	Newgate Market	1 Hamper . . .	Meat	1	3	10
Jennings . . .	do.	1 Hamper . . .	Meat	1	0	22
Worley	do.	1 Flat	Butter	0	2	0
				3	2	4

The above goods were so delivered at the same time, to be carried together by the company on their railway from the Steventon station to the Paddington station, and to be there delivered together to Parker.

The company received and carried such goods accordingly, and charged Parker for so doing 4s. 9d., which *he paid under similar protest, and was obliged to pay, in order to procure the carriage [*613 and delivery of the goods.

The plaintiffs contend that Parker was entitled to be charged, on the aggregate weight of 3 cwt. 2 qrs. 4 lbs., at the rate of the fifth class of goods in the tonnage-scale of bill A., in which class both meat and fresh butter are specified, and which rate, from Paddington to Steventon, was 18s. a ton, and was the same as the rate fixed for carriage from Steventon to Paddington, at which rate the charge for the carriage of the said goods would have been 3s. 2d.; and the plaintiffs allege the difference between that sum and 4s. 9d. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on their aggregate weight, both from the nature of the goods, and as they were not of the same kind; and, independently of other objections to this obligation, they allege, that, except when the weight of several packages of the same kind of goods going to some one ultimate consignee exceeded 2 cwt., the goods, being sent by a carrier, were to be charged in the miscellaneous class, and, accordingly, that the company had a right to charge, as they had charged, 4s. 9d., which is made up thus:—

	£	s.	d.
Miscellaneous, 3 cwt. 2 qrs. 4 lbs., at sixth class, or 18s. a ton	0	4	3
3 Parcels, at 2d. each	0	0	6
	0	4	9

The company further contend, that, at all events, they were entitled to charge as much as 3s. 5d., which would have been the amount charged to any tradesman, or other person not a carrier, had he sent the same

goods on the same occasion, to be carried by the company on the same
 *614] journey, since the miscellaneous class was, in *May 1844, applied,
 to the public, who consequently would have been charged thus:—

	£	s.	d.
Meat, 3 cwt. 0 qrs. 4 lbs., at fifth class, or 18s. a ton	0	2	9
Miscellaneous, 2 qrs. 0 lbs., at sixth class, or 24s. a ton	0	0	8
	<hr/>		
	0	3	5

4. On the 16th of May, 1844, after the passing of the 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class being applied to the public, Parker delivered to the company in a similar way, exactly similar goods to those last mentioned, similarly declared in the ticking-off note accompanying them, to be carried on the same journey, and delivered to him as before. The company carried them, as on the former occasion, charged him the same sum as on that occasion, which he paid them under protest, and upon the same compulsion. The plaintiffs claim to recover the same overcharge as on the former occasion, upon the same grounds. The company justify their charge as on the former occasion: and they further contend that they were not limited as to the charge made to Parker or other carriers, by the charge made to tradesmen or persons not carriers; as they allege that the goods were not in such cases carried "*under the like circumstances.*"

5. On the 1st of July, 1844, after the passing of 7 Vict. c. iii., bill A. being then in operation, and the miscellaneous class not being applied to the public other than carriers, Parker delivered to the company, in a similar way, exactly similar packages of goods to those last mentioned, similarly declared in the ticking-off note accompanying them, to be carried on the same journey, and delivered to Parker as before. The company carried them as on the two former occasions, charged him the
 *615] same sum as on those occasions, which he paid, as *then, under similar protest, and upon the same compulsion. The plaintiffs claim to recover the same overcharge as on the former occasions, upon the same grounds.

The company justify their charge on the same grounds as on the last previous occasion, except the partial justification arising out of the miscellaneous class being applied to the public at large.

During the whole of the time in which bill A. was in operation, the company were constantly employed by tradesmen and other persons not carriers to carry goods for them on all parts of the said railway. If, on any of the occasions mentioned under this first head of claim, or on any other similar occasion, the company had carried the same packages of goods as those respectively specified under this first head of claim, on the same journey, for a tradesman or other person not a carrier, the respective charges for so doing, instead of 2l. 5s. 11d., 2l. 5s. 11d., 4s. 9d., 4s. 9d., and 4s. 9d. (the respective sums charged to and paid

by Parker), would have been respectively 2l. 5s. 2d., 2l. 5s. 2d., 3s. 5d., 3s. 5d., and 3s. 2d. only; and, in such case, it would have made no difference, whether, in each instance, the several packages were to be delivered to one consignee or to several consignees, provided such tradesman or other person not a carrier had been the party charged with the carriage. But any other carrier would have been charged the same as Parker.

The goods, whether carried for Parker, or a tradesman, or other person not a carrier, would have been conveyed in and propelled by a like carriage and engine, would have passed only over the same portion of, and over the same distance along, the said railway, *and under the like circumstances, unless the fact of Parker being such carrier, and so carrying on his business as hereinbefore mentioned, renders the circumstances unlike.*

*The charges and mode of charge contended for by the plaintiffs under this first head of claim, were fair and reasonable. [*616]

There was nothing unfair or unreasonable in the charges or mode of charge adopted by the company towards Parker, as stated under this first head of claim, when considered by themselves, and without reference to the charges and mode of charge adopted towards persons not carriers; and the said charges and mode of charge adopted towards Parker were fair and reasonable, unless, from the circumstances stated in this case, they appear to have been otherwise.

Each of the several alleged overcharges stated under this first head of claim, is an instance of a numerous class, out of which it is selected for the purpose of ascertaining the opinion of the court; so that, in pursuance of the order of nisi prius, the amount, if any, recoverable by the plaintiffs, may be assessed in conformity with such opinion.

The first question for the opinion of the court, is, whether the company were justified in charging Parker in the mode above stated, in the instances above stated; and, if not, whether the mode of charge, contended for by the plaintiffs, or what other mode of charge, is the proper one; and whether the plaintiffs are entitled to recover the amounts above claimed as overcharges, or any, and, if any, what part thereof; and, if they are so entitled, whether the same can be recovered in this action.

Second Head of Claim.

1. On the 24th June, 1845, bill B. being then in operation, Parker delivered to the company, at their station at Chippenham, the packages of goods hereinafter next specified, weighing altogether 11 cwt., accompanied by the usual ticking-off note, declaring correctly (in the proper columns) the names of the ultimate consignees, *and the description, contents, and weight of the packages in the manner [*617] following:—

Name, &c., of consignee.	Description of package.	Contents.	Cwt.	Qrs.	Lbs.
Raymond	2 Bales	Bacon	4	1	0
Barringer	1 Bale	ditto	2	0	0
Ray	2 Bales	ditto	4	3	0
			11	0	0

The above goods were so delivered, all at the same time, to be carried together by the company on the said railway from the Chippenham station to the Paddington station, and to be there delivered together to Parker.

The company received and carried such goods accordingly, and charged Parker for so doing 10s., which he paid under similar protest, and was obliged to pay, in order to procure the carriage and delivery of the goods.

The plaintiffs contend that Parker was entitled to have the above goods charged on the aggregate weight of 11 cwt. at the rate of the second class of goods in the tonnage-scale of the said bill B., in which class bacon was specified, at which rate, from Paddington to Chippenham, was 16s. a ton, and was the same as the rate fixed from Chippenham to Paddington; at which rate the charge for the carriage of the said goods would have been 8s. 10d.; and the plaintiffs allege the difference between that sum and 10s. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on the aggregate weight; and, independently of other objections to such obligation, they allege, that, except where the *618] weight of the same kind of goods going to some one* ultimate consignee exceeded 3 cwt., the goods, being sent by a carrier, were to be charged in the miscellaneous, or fifth class; and, accordingly, that the company had a right to charge, as they had charged, 10s., which is made up thus:—

	£	s.	d.
Bacon, 9 cwt., at second class, or 16s. a ton	0	7	2
Miscellaneous, 2 cwt., at fifth class, or 28s. a ton	0	2	10
	0	10	0

The company also contend that they were not limited, as to the charge made to Parker or other carriers, by the charge made to tradesmen and other persons not carriers; as they allege that the goods were not in such cases carried *under the like circumstances*.

2. On the 22d of June, 1845, bill B. being then in operation, Parker

delivered to the company at their station at Taunton, the packages of goods hereinafter next specified, weighing altogether 6 cwt. 1 qr. 26 lbs., accompanied by the usual ticking-off note, declaring correctly, in the proper columns, the names and places of residence of the ultimate consignees, and the description, contents, and weight of the packages, in the manner following:—

Name, &c., of consignee.	Description of packages.	Contents.	Cwt.	Qrs.	Lbs.
Pawley, London	1 Keg	Butter	0	2	14
Bonsor, ditto	1 Hamper	Meat	2	3	24
Bonsor, ditto	1 Hamper	Meat	2	3	8
Channing, ditto	1 Basket	Butter	0	0	8
			6	1	26

The above goods were so delivered all at the same time, to be carried together by the company on the said *railway from the Taunton station to the Paddington station, and to be there delivered together to Parker. [*619

The company received and carried the said goods accordingly, and charged Parker for so doing 14s. 3d., which he paid under similar protest, and was obliged to pay in order to procure the carriage and delivery of the goods.

The plaintiffs contend that Parker was entitled to have the above goods charged on the aggregate weight of 6 cwt. 1 qr. 26 lbs., at the rate of the fourth class of goods in the tonnage-scale of the said bill B., in which class meat and fresh butter are both specified, and which rate, from Paddington to Taunton, was 41s. a ton, and was the same as the rate fixed from Taunton to Paddington, at which rate the charge for the carriage of the said goods would have been 13s. 4d.: and the plaintiffs allege the difference between that sum and 14s. 3d. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on the aggregate weight, both from the nature of the goods, and as they were not of the same kind: and, independently of all other objection to such obligation, they allege, that, except where the weight of the same kind of goods going to some one ultimate consignee exceeded 3 cwt., the goods, being sent by a carrier, were to be charged in the miscellaneous, or fifth class; and, accordingly, that the company had a right to charge, as they have charged, 14s. 3d., which is made up thus:—

	£	s	d.
Meat (going to Bonsor), 5 cwt. 3 qrs. 4 lbs., at fourth class, or 41s. a ton	0	12	0
Miscellaneous, 2 qrs. 22 lbs., at fifth class, or 48s. a ton	0	1	11
Two parcels, at 2d. each	0	0	4
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	0	14	3

*620] *The company also contend that they are not limited, as to their charge made to Parker and other carriers, by the charge made to tradesmen and others, not carriers, as they allege that the goods were not in such cases carried *under the like circumstances*.

During the whole of the time in which bill B. was in operation, the company were constantly employed by tradesmen and other persons, not carriers, to carry goods for them on all parts of the said railway. If, on any of the occasions mentioned under this second head of claim, or on any other occasion whilst bill B. was in operation, the company had carried the same packages of goods as those respectively specified under the second head of claim, on the same journeys, for a tradesman or other person not a carrier, the respective charges for so doing, instead of 10s. and 14s. 3d. (the respective sums charged to and paid by Parker), would have been respectively 8s. 10d. and 13s. 4d. only; and, in such cases, it would have made no difference, whether, in each instance, the several packages were to be delivered to one consignee or several consignees, provided such tradesman or other person not a carrier had been the party charged with the carriage. But any other carrier would have been charged the same as Parker.

The goods, whether carried for Parker or a tradesman or other person not a carrier, would have been conveyed in and propelled by a like carriage and engine, would have passed only over the same portion of, and over the same distance along, the said railway, and under the like circumstances, unless the fact of Parker being such carrier, and so carrying on his business as hereinbefore mentioned, rendered the circumstances unlike.

The charges and mode of charge contended for by the plaintiffs under this second head of claim, were fair and reasonable. There was nothing *621] unfair or unreasonable *in the charges or mode of charge adopted by the company towards Parker, as stated under this second head of claim, when considered by themselves, or without reference to the charges and mode of charge adopted towards persons who were not carriers; and the said charges and mode of charge adopted towards Parker were fair and reasonable, unless from the circumstances stated in this case they appear to have been otherwise.

Each of the several alleged overcharges stated under this second head of claim, is an instance of a numerous class, out of which it is selected for the purpose of ascertaining the opinion of the court, and so that, in pursuance of the order of nisi prius, the amount, if any,

recoverable by the plaintiffs, may be assessed in conformity with such opinion.

The second question for the opinion of the court, is,—whether the company were justified in charging Parker in the mode under this second head of claim above stated, in the instances above stated; and, if not, whether the mode of charge as contended for by the plaintiffs as above stated, or what other mode of charge, is the proper mode; and whether the plaintiffs are entitled to recover the amounts claimed under this second head as overcharges, or any, and if any, what part thereof, and, if they *are* so entitled, whether the same can be recovered in this action.

Third Head of Claim.

1. On the 22d of July, 1844, bill A. being then in operation, Parker delivered to the company at their station at Chippenham, the packages of goods hereinafter next specified, weighing altogether 15 cwt. 1 qr. 4 lbs., accompanied by the usual ticking-off note, correctly declaring, in the proper columns, the names and places of residence of the ultimate consignees, and the description, *contents, and weight of the [*622 packages, in the manner following:—

Name, &c., of consignee.	Description of package, &c.	Contents.	Cwt.	Qrs.	Lbs.
Raymond, London	3 Bales	Bacon	5	3	0
Marriott, ditto	1 Bale	Bacon	2	1	6
Marshall, ditto	1 Bale	Bacon	2	2	12
Read & Son, ditto	1 Bale	Bacon	2	1	14
Brewer, ditto	1 Bale	Bacon	2	1	0
			15	1	4

The above goods were so delivered at the same time, to be carried together by the company on the said railway, from the Chippenham station to the Paddington station, and to be there delivered together to Parker. The company received and carried the said goods accordingly, and charged Parker for so doing 1*l.* 2*s.* 8*d.*, which he paid under similar protest, and was obliged to pay, in order to procure the carriage and delivery of the goods.

The plaintiffs contend that Parker was entitled to have the above goods charged on the aggregate weight of 15 cwt. 1 qr. 4 lbs. at the rate of the third class of goods in the tonnage-scale of the said bill A., in which class "bacon" is specified; and which rate, from Paddington to Chippenham, was 24*s.* a ton, and was the same as the rate fixed from

Chippenham to Paddington; at which rate, the charge for the carriage of the said goods would have been 16s. 7d.; and the plaintiffs allege the difference between that sum and 1l. 2s. 8d. to be an overcharge, which they claim to recover.

On the other hand, the company contend that they were not bound to charge these goods on the aggregate weight; and, independently of *623] any objection founded on *the nature of the goods or packages, they say, that, except where the weight going to some one ultimate consignee exceeded 500lbs., the company were at liberty to charge the goods in the miscellaneous, or sixth class, and were not bound, as to their charges to Parker, by the charge made to persons not carriers; as, in such cases, the goods were not carried under the like circumstances; and, accordingly, that the company had a right to charge, as they have charged, 1l. 2s. 8d., which is made up thus:—

	£	s.	d.
Bacon (the three bales going to Raymond exceeding 500 lbs.), 5 cwt. 3 qrs., at third class rate, or 21s. per ton	0	6	0
Miscellaneous, 9 cwt. 2 qrs. 4 lbs., at sixth class rate, or 35s. a ton	0	16	8
	1	2	8

2. On the 26th of November, 1844, bill A. being then in operation, Parker delivered to the company, at their station at Cirencester, a cask of lard weighing 4 cwt., together with other packages of goods weighing upwards of 500lbs., to be carried on the said railway from the Cirencester station to the Paddington station, and there delivered to him, together with the other goods. The lard and other goods were accompanied by the usual ticking-off note, which correctly declared, in the proper columns, the names and residences of the ultimate consignees, the description of the packages, and their contents and weight.

The company received and carried the cask of lard, and the other goods, accordingly, and charged Parker for so carrying the cask of lard (the charges for the other goods being unimportant with reference to this head) 7s., which he paid under similar protest, and was obliged to pay, in order to procure the carriage and delivery of the lard.

*624] The plaintiffs contend that Parker was entitled to *have the said lard charged at the rate of the third class of goods in the tonnage-scale of the bill A., in which class lard is specified, and which rate from Paddington to Cirencester was 21s. a ton, and was the same as the rate fixed for carriage from Cirencester to Paddington, at which rate the charge for the carriage of the said lard would have been 4s. 3d.; and the plaintiffs allege the difference between that sum and 7s. to be an overcharge, which they claim to recover.

On the other hand, the company contend, that, the weight of this package being under 500lbs., they had a right to include it among the miscellaneous goods, and to charge it at the rate of the sixth or miscellaneous class, according to which the charge was 7s., which they have

charged; and that they are not limited, as to the charge made to Parker and other carriers, by the charge made to tradesmen or persons not carriers, as they allege, that, in such cases, the goods were not carried *under the like circumstances*.

3. On the 26th of December, 1844, the bill A. then being in operation, Parker delivered to the company at their station at Bridgewater, a single hamper of meat, weighing 4 cwt. 0 qrs. 22 lbs., accompanied by the usual ticking-off note, correctly declaring the name and residence of the ultimate consignee, and the description, contents, and weight of the package, in the manner following:—

Name, &c., of consignee.	Description of package, &c.	Contents.	Cwt.	Qrs.	Lbs.
Matthews, Newgate Market	1 Hamper . . .	Meat	4	0	22

The above hamper of meat was so delivered to be carried by the company on their said railway from the Bridgewater station to the Paddington station, and to *be there delivered to Parker. The company [*625 received and carried the hamper of meat accordingly, and charged Parker for so doing 10s. 7d., which he paid under similar protest, and was obliged to pay, in order to procure the carriage and delivery of the meat.

The plaintiffs contend that Parker was entitled to have the said hamper of meat charged at the rate of the fifth class of goods in the tonnage-scale of the bill A., in which class meat is specified, and which rate, from Paddington to Bridgewater, was 45s. a ton, and was the same as the rate fixed for the carriage from Bridgewater to Paddington, at which rate the charge for the carriage of the said hamper of meat would have been 9s. 7d.; and the plaintiffs allege the difference between that sum and 10s. 7d. to be an overcharge, which they claim to recover.

On the other hand, the company contend, that, the weight of this package being under 500lbs., they had a right to charge it at the rate of the sixth or miscellaneous class, according to which the charge was 10s. 7d., which they have charged, and that they are not limited, as to the charge made to Parker and other carriers, by the charge made to tradesmen or persons not carriers; as they allege, that, in such cases, the goods were not carried *under the like circumstances*.

During the whole of the time in which bill A. was in operation, the company were constantly employed by tradesmen and other persons not carriers, to carry goods for them on all parts of the said railway. If, on the occasions mentioned under this third head of claim, or on any other similar occasions whilst bill A. was in operation, the company had carried the same goods on the same journeys for a tradesman or other

person not a carrier, the charge for so carrying the packages first specified under this head of claim, instead of 1*l.* 2*s.* 8*d.* (the sum charged to and paid by Parker), would have been 16*s.* 7*d.* only, and the charge *626] for so carrying the said lard would, *instead of 7*s.* (the sum charged to and paid by Parker), have been 4*s.* 3*d.* only; and in such cases, provided the tradesman or other person not a carrier was the party charged with the carriage, it would have made no difference whether in each instance the several packages were to be delivered to the same consignee or to different consignees; and the charge for so carrying the said hamper of meat, instead of 10*s.* 7*d.* (the sum charged to and paid by Parker), would have been 9*s.* 7*d.* only; *and any other carrier would have been charged in each case the same as Parker.*

All the said goods, whether carried for Parker or a tradesman, would have been conveyed in and propelled by a like carriage and engine, would have passed only over the same portion of, and over the same distance along, the said railway, and under the like circumstances, unless the fact of Parker being such carrier, and so carrying on his business as hereinbefore mentioned, rendered the circumstances unlike.

The charges and mode of charge contended for by the plaintiffs under this third head of claim, were fair and reasonable. There was nothing unfair or unreasonable in the charges made, or mode of charge contended for by the company, considered by themselves, and without reference to the charges and statements contained in the bill A., and to the charges and mode of charge adopted towards persons who were not carriers; and the charges and mode of charge made and contended for by the company, as stated under the third head, were fair and reasonable, unless, from the circumstances stated in this case, they appear to have been otherwise.

Each of the alleged overcharges under this head of claim is one of a class, out of which it is selected for the purpose of ascertaining the opinion of the court; and so that, in pursuance of the order of nisi *627] prius, the amount *if any, recoverable by the plaintiffs may be assessed in conformity with such opinion.

The third question for the opinion of the court, is,—whether the company are justified, in the instances stated under this third head of claim, in charging Parker in the mode contended for by them, as stated under this head; and, if not, whether the mode contended for by the plaintiffs, or what other mode, is the proper mode; and whether the plaintiffs are entitled to recover the amounts claimed under this head as overcharges, or any and what part thereof; and, if they *are* so entitled, whether the same can be recovered in this action.

Fourth Head of Claim.

On the 14th of May, 1844, bill A. being then in operation, and the miscellaneous class being applied to the public, Parker delivered to the

company, at their station at the Tiverton Road, the packages of goods hereinafter next specified, weighing altogether 1 cwt. 2 qrs. 14 lbs., accompanied by the usual ticking-off note, correctly declaring, in the proper columns, the names of the ultimate consignees, and the descriptions and weights of the packages, in the manner following:—

Name.	Address.	Description and contents.	Cwt.	Qrs.	lbs.
Johnson & Co.	1 Paper	0	0	14
H. Goffin	1 Box	0	3	8
Courtney	1 Basket	0	2	20

The contents of the several packages, though not specified, are to be taken to be different from each other. The above goods were so delivered all at the same time, to be carried together by the company on their said railway, from the Tiverton Road station to the Paddington *station, and to be there delivered together to Parker. The company received and carried the said goods accordingly, and [*628 charged Parker for so doing 5s. 11d., which he paid under similar protest, and was obliged to pay, in order to procure the carriage and delivery of the goods. The charge was composed of 5s. 5d., being the amount payable upon the aggregate weight of 1 cwt. 2 qrs. 14 lbs., according to the “Parcels” scale in bill A., with the addition of 2d. for each of the three packages.

The plaintiffs contend that bill A. does not warrant any charge beyond the sums stated in the parcels-scale, and that the additional 2d. for each package is an overcharge, which they claim to recover. On the other hand, the company contend that they were at liberty to charge the 5s. 11d., because they allege (as was the fact) that it amounted to less than the charge stated in the “parcels” scale would amount to, if each package were charged separately by that scale, without any additional charge for such package; and they also contend, that, both inasmuch as the packages were of different kinds, and were going to different ultimate consignees, the company had a right to treat them as miscellaneous goods, and to charge 2d. a package over and above the charge stated in the “parcels” scale,—especially as, owing to the goods being of different kinds, the same charge would at the time in question have been made to persons not carriers.

On the 27th of June, 1844, bill A. being then in operation, and the miscellaneous class not being applied to the public other than carriers, Parker delivered to the company, in a similar way, exactly similar packages of goods to those last mentioned, similarly declared in the

ticking-off note accompanying them, to be carried on the same journey, and delivered to Parker, as before. The company carried them as on the former occasion, charged him the same sum as on that occasion, *629] which he paid as *then under protest, and upon the same compulsion. The plaintiffs claim to recover the same overcharge as on the former occasion, upon the same grounds. The company justify the charge as on the former occasion, except so far as the justification is founded on the charge being the same to persons not carriers; and they further contend that they were not limited, as to the charge made to Parker and other carriers, by the charge made to tradesmen and other persons not carriers, as they allege that the goods were not in such cases carried *under the like circumstances*.

On the 11th of July, 1845, the bill B. being then in operation, Parker delivered to the company, at their station at Paddington, the packages of goods hereinafter next specified, weighing altogether 1 cwt. 2 qrs. 20 lbs., accompanied by the usual ticking-off note, correctly declaring, in the proper columns, the names and places of residence of the ultimate consignees, and the description and weight of the packages, in the following manner:—

Name, &c., of consignee.	Description of package, &c.	Contents.	Cwt.	Qrs.	Lbs.
Hawkes, Reading	1 Basket . . .	. . . . .	0	1	10
Darris, ditto	1 Box . . . . .	. . . . .	0	2	24
Tanner, ditto	1 Truss . . .	. . . . .	0	2	14
			1	2	20

The contents of the several packages, though not specified, are to be taken to be different from each other, and falling within different classes of the “parcels” scale in bill B.

The above goods were so delivered all at the same time, to be carried together by the said company on the said railway, from the Paddington *630] station to the Reading *station, and to be there delivered together to Parker. The company received and carried the goods accordingly, and charged Parker for so doing 1s. 9d., which he paid under similar protest, and was obliged to pay, in order to procure the carriage and delivery of the goods. The charge was composed of 1s. 3d., being the amount payable upon the aggregate weight, 1 cwt. 2 qrs. 20 lbs., according to the fourth class, or highest class, of the “parcels” scale in the bill B., with the addition of 2d. for each of the three packages.

The plaintiffs contend that bill B. does not warrant any charge beyond

the sums stated in the "parcels" scale, and that the additional 2*d.* for each package is an overcharge, which they claim to recover.

On the other hand, the company contend that they were at liberty to charge the 1*s.* 9*d.*, because they allege (as was the fact) that it is a less sum than that to which the charge stated in the "parcels" scale would amount, if each package were charged separately by that scale, without any additional charge for each package: and they also contend, that, inasmuch as the packages were going to different ultimate consignees, the company had a right to treat them as miscellaneous, and to charge 2*d.* a package over and above the charge stated in the "parcels" scale.

The "parcels" scales in both bills are so constructed, that, in the great majority of cases, the charge, if made on each package separately, according to those scales, without any addition, would exceed the amount of charge made according to those scales on the aggregate weight of the packages. But the company, whilst bills A. and B. respectively were in operation, charged all persons upon the aggregate weight of their packages falling within the "parcels" scale, and not upon each package separately.

During the whole time when bills A. and B. *respectively [*631 were in operation, the company were constantly employed by tradesmen and other persons not carriers, to carry goods for them on all parts of the said railway. If, on the occasions mentioned under this fourth head of claim, or on any similar occasions during the period in question, the company had carried the same packages of goods as those respectively specified under this fourth head of claim, on the same journeys, for a tradesman or other person not a carrier, the charge for so doing, in the instance first mentioned under this head, would have been the same as that charged to Parker, the charge for miscellaneous goods being applied to the public at large, as well as carriers, during May, 1844; but the respective charges for the carriage of such packages respectively in the several other instances under this head of claim, would have been less than the sums charged to and paid by Parker, by the amounts of 2*d.* a package so claimed by the plaintiffs as overcharges as aforesaid, which charge of 2*d.* a package would not have been made to persons other than carriers; and, in such cases, it would have made no difference whether in each instance the several packages were to be delivered to one consignee or to several consignees, provided such tradesman or other person not a carrier had been the party charged with the carriage. But any other carrier would have been charged the same as Parker.

The goods, whether carried for Parker, or a tradesman or other person not a carrier, would have been conveyed in and propelled by a like carriage and engine, would have passed only over the same portion of, and over the same distance along, the said railway, and under the like circumstances, unless the fact of Parker being such carrier, and so

carrying on his business as hereinbefore mentioned, rendered the circumstances unlike.

The charges and mode of charge contended for by the plaintiffs under *632] this fourth head of claim were fair and *reasonable. There was nothing unfair or unreasonable in the charges or mode of charge adopted by the company towards Parker, as stated, under this fourth head of claim, when considered by themselves, and without reference to the scale of charges contained in bills A. and B., and to the charges and mode of charge adopted towards persons who were not carriers. And the said charges and mode of charge adopted towards Parker were fair and reasonable, unless, from the circumstances stated in this case, they appear to have been otherwise.

Each of the several alleged overcharges stated under this fourth head of claim, is an instance of a numerous class, out of which it is selected for the purpose of ascertaining the opinion of the court, and so that, in pursuance of the order of nisi prius, the amounts, if any, recoverable by the plaintiffs, may be assessed in conformity with such opinion.

The fourth question for the opinion of the court, is,—whether the company were justified in charging Parker the said sums of 2*d.* a package so alleged by the plaintiffs to be overcharges, as under this fourth head of claim stated; and, if not, whether the plaintiffs are entitled to recover those sums, or any, and if any, which of them; and, if they are so entitled, whether the same can be recovered in this action.

Fifth Head of Claim.

The fifth head of claim is for a deduction from the company's charges, and is claimed as a compensation for the weighing, loading, and unloading, or for so much thereof as was performed by Parker's men between the 1st of May, 1844, and the end of May, 1846.

By "loading and unloading" is meant the unloading of goods from the carrier's wagon, or any vehicle on which they may be brought to any of the company's railway stations, the removing them to, and *633] loading them *in, the company's railway trucks, the unloading them from these trucks when they had arrived at the station of delivery, and the removing them to, and loading them in, the carrier's wagon or other vehicle prepared for them at the station of delivery.

For some years previous to 1844, the company were in the habit of allowing to the generality of carriers who employed them, a discount of 10 per cent. off the amount of the company's printed charges, not merely as an equivalent for any extra trouble given to the carriers in complying with the company's regulations, or for any labour saved to the company by the services of the carrier's men, but also as an inducement to the carriers, in the infancy of railway traffic, to bring to the company the extensive business then in the carriers' hands; and, in short, to become the wholesale customers of the company.

Besides filling up the ticking-off notes, or carriers' declarations, as

already described, the carriers had men in attendance at the railway station to and from which they sent and received their goods, at the times of the departure and arrival of the goods trains, who, in conjunction with the company's servants, loaded and unloaded the carriers' goods.

This course of business continued until about the time of the decision of *Parker v. The Great Western Railway Company*, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott, N. R. 835, in February 1844. That judgment having decided that certain charges made by the company to carriers were illegal, the company altered their system of dealing with the carriers. They withdrew entirely the allowance of 10 per cent., forbade the carriers' men to do any part of the stowage, or to enter the trucks, either for the purpose of loading or unloading them, or to troll, or carry the goods between the railway trucks and the carriers' wagons; and they revised their scale of charges, reducing the rates on an average upwards of 10 per cent., *except for packages not exceeding 500lbs., charged as miscellaneous, in the manner before stated,— [*634 the miscellaneous class being then first introduced. This reduction was not confined to carriers, but extended to the public at large, to whom no discount had been allowed. These alterations came into operation on the 1st of May, 1844.

The company have never, since the 30th of April, 1844, allowed the 10 per cent., or any discount, to any carrier. They had, in the preceding January, entered into a special agreement with a carrier named Kent, which was to continue in force for a year; and, by one of the terms of this agreement, they were to make Kent an allowance of 10 per cent. upon their charges to him; but the company refused to act on this agreement after the 30th of April, 1844. Kent brought an action against the company for this refusal, and recovered 201*l.* 10*s.* damages for the nonpayment of the allowance from the 1st of May, 1844, to the 1st of January 1845, which, together with costs, the company paid, under legal compulsion; and, after Kent had brought a second action for subsequent breaches, the company paid him a considerable sum to be entirely released from the agreement, and all claims under it. The company never after the 30th of April, 1844, made any other payment or allowance which could in any way be regarded as the payment or allowance of the carriers' said discount of 10 per cent., or any part thereof.

From the 1st of May, 1844, until after May, 1846, the carriers in general, and Parker among others, filled up the ticking-off notes, as described in the early part of this case, and delivered them with the goods. Parker's men (as did those of other carriers) attended at the stations at the times of departure and arrival of the goods trains, but their services were usually confined to unloading Parker's wagons, and delivering the goods to the company's men, and in receiving the goods

from the company's men, and loading them on Parker's wagons. The
 *635] usual course *was, for the carriers' men to load and unload their
 own wagons, and for the company's men to load, stow, and un-
 load the railway trucks, and to carry or troll the goods between the
 railway trucks and the carriers' wagons. Although this course, which
 was in accordance with the company's orders, was not very strictly
 observed, the company never sanctioned any deviation from it, except
 on certain occasions, when meat used to arrive at Paddington in large
 quantities from the country for the carriers, and particularly for Parker,
 whose business was particularly extensive in the meat department. On
 these occasions, which were termed the meat mornings (being the morn-
 ings of Friday and Saturday in each week), Parker's men used, in
 addition to their other work, to enter the railway trucks, and do the
 principal part of the unloading the meat from those trucks, and the
 carrying it to Parker's carts; and several extra men in Parker's employ
 attended for this purpose on the meat mornings. This was done with
 the sanction of the company, who, without such assistance, would not
 have been able to deliver the meat within a reasonable time.

The attendance and services of Parker's and other carriers' men at
 the stations, was a matter of mutual convenience to the company and
 to the carriers.

It was essential to the success of the carriers' business that they
 should always have their goods delivered earlier than the company could
 be reasonably required to deliver them, without a far greater degree
 of assistance from the carriers than the company were in the habit of
 receiving from the rest of the public. This was especially the case
 with Parker on meat mornings: and the requisite expedition was obtained
 by the services of his men. On the other hand, those services tended
 on all occasions to the general despatch of the company's business;
 and, on meat mornings, enabled them to sustain the extra pressure of
 *636] work, without an increase of hands. The company's *staff was
 sufficient, without the assistance of the carriers' men, for the
 despatch and delivery of goods within a reasonable time, *except on meat
 mornings.*

The company were during the time in question saved considerable
 labour and expense, from the weights being filled up in the-ticking-off
 notes. But the filling up these notes imposed upon Parker no appreci-
 able increase of labour or expense; as he must, for the purposes of his
 own business, have weighed the goods, and taken an account of the
 particulars of the several packages. Parker never objected to furnish
 the weights, or to fill up the ticking-off notes; but the company had
 given notice that the goods would not be received by them, unless the
 ticking-off notes were properly filled up; and it was taken by Parker
 and the carriers as a general rule, that the weights must be filled up,
 in order to secure the carriage of the goods. When any of the goods

have been weighed at the stations, such weighing has always been done by the company's servants.

Parker was ready and willing, during the whole time in question, and the company had notice of such readiness and willingness, to do the whole of the loading and unloading, as above defined. He never refused to have his men in attendance, or required the company to do the work done by his men, or demanded as such any compensation for their services; nor did he ever require the company to do any of the loading, unloading, or weighing. No request was ever made, on the part of the company, that Parker's men should attend or do the work done by them; but their services were rendered and accepted, without objection on one side, and without solicitation on the other.

The company made no separate charges to any person during the period in question, for weighing, loading, or unloading; the charges for carriage being considered by them sufficient to provide for any ordinary trouble or *expense to which the company might be put in [*637 weighing, loading, and unloading.

The whole expense of loading and unloading the goods sent by Parker during the period in question, is, for the purpose only of ascertaining the opinion of the court on the defendant's liability, admitted to be 500*l*. The expense to Parker of so much of the said loading and unloading as was done by his men, is, for the same purpose only, admitted to be 200*l*. The expense to Parker of so much of such loading and unloading done by his men as consisted in unloading the railway trucks, and carrying the goods from thence to the carriers' waggons, being those services performed by Parker's men on meat mornings which on other occasions were done by the company's men, is, for the same purpose only, admitted to be 100*l*. The expense to Parker of weighing saved to the company, is, for the same purpose only, admitted to be 50*l*.

None of the above expenses depend upon the amount payable for the carriage of the goods to which they relate; nor do such expenses necessarily vary at all in proportion to such amount; but they are quite incapable, before the actual sums are known, of being measured or estimated by any per centage on such amount.

Parker paid all the charges for the carriage of goods carried for him by the company during the period in question, under a protest, in the form previously stated. He was obliged to pay such charges, in order to procure the carriage and delivery of the goods.

The plaintiffs contend that they are entitled to recover, as overcharges, so much of the 10*l*. per cent. on the said charges for carriage, as is equal to the above expenses, or to such of them as were incurred by Parker; or, at all events, to such as were incurred by him on meat mornings, in doing the work which properly belonged to the company's men.

The accounts, or books of accounts, referred to in the *particulars of demand and notice of action, contain no further state- [*638

ment of this head of claim than they are by the notice of action shown to contain.

The fifth question for the opinion of the court, is,—whether the plaintiffs are entitled to recover any, and, if any, what part, of the said 10 per cent., or any and which of the above sums of 500*l.*, 200*l.*, 100*l.*, and 50*l.*; and, if they are so entitled, whether the same can be recovered in this action.

Sixth Head of Claim.

On the 10th of February, 1848, and before the commencement of the action, but after the notice thereof, the plaintiffs served on the company a demand in writing, bearing date the 8th of February, 1848, whereby they demanded payment of the money alleged in the notice of action to be due to them, and claimed interest thereon from the date of that demand until payment.

The plaintiffs now contend that they are entitled to recover such interest, not exceeding 5 per cent. per annum, from the 10th of February, 1848, as the arbitrator may think proper to allow, on all such sums as are recoverable by them under the foregoing heads of claim, or any of them.

The company contend that the plaintiff's claims under the foregoing heads, if recoverable at all, are not such debts or sums certain as to warrant a jury, or the arbitrator, in giving interest on them; and also that interest is not recoverable, because not included in the notice of action.

The last question for the opinion of the court, is,—whether, in addition to any other sum or sums recoverable in this action, the plaintiffs are entitled to recover interest thereon, if the arbitrator shall think the case a proper one for giving interest.

The court are to be at liberty, throughout this case, if they shall *639] think proper, to draw all such inferences from *any of the facts stated as a jury would be warranted in drawing.

When the court shall have decided upon the above questions, the arbitrator, pursuant to the order of nisi prius, is to ascertain and direct for what amount, or in what way, the verdict is to be entered, and to determine the matters in difference in accordance with such decision.

Byles, Serjt. (with whom was *J. Brown*), for the plaintiffs.—The general principles laid down by this court in *Parker v. The Great Western Railway Company*, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott, N. R. 835, viz., that the company are bound to impose equal charges upon all persons using their railway, and are not to make a distinction between carriers and the public, and that any excess in the charges exacted by them for the performance of this duty, may be recovered back in an action for money had and received,—will proba-

bly not be disputed. But an act of parliament, the 7 & 8 Vict. c. iii., which passed after the date of that decision, will be relied upon as effecting an alteration in the rights and duties of the company in this respect. That act, however, can have no application to some of the transactions detailed in this case.

I. 1. The first transaction under the first head of claim discloses an inequality of charge, contrary to the 24th section of the 2 Vict. c. xxvii., which requires that the carriage rates shall be at all times charged equally to all persons. The case shows that these goods, if sent by one not a carrier, would have been lumped together, although intended for several ultimate consignees; but that a different system was adopted towards the carrier. This point was decided against the company in the case already referred to. Supposing they *had* charged the public the same that they charged the carriers, still that would have been wrong. The carrier, and not the *ultimate con- [*640
signee, is, as between him and the company, the owner of the
goods: he brings them to the company; and he receives them from
the company.

2. The second transaction under this head took place after the passing of the 7 & 8 Vict. c. iii. The 48th section of that act repealed the 24th section of the 2 Vict. c. xxvii. The 49th section enacts that all tolls for the use of the railway shall at all times be charged equally to all persons, and after the same rate, whether per mile, or per ton per mile, or otherwise, in respect of all passengers, goods, &c. And the 50th section enacts that it shall be lawful for the company, whenever they shall act as carriers, or shall provide locomotive or steam power or carriages for the conveyance of passengers, goods, &c., to charge for such locomotive or steam power and carriages such sum (not exceeding certain limits), and that either per ton or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, as they shall think expedient: provided always, that, in whatever way the charges are made, they shall be made equally to all passengers, and to all persons in respect of all goods, &c., of a like description and quality, and conveyed in or propelled by a like carriage or engine, passing only over the same portion of, and over the same distance along, the railway, *and under the like circumstances*; and that no reduction or advance in any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person. This provision, it is submitted, does not in any respect alter the company's condition: the words "under the like circumstances," do not refer to the character of the persons who employ them, but to the trouble, expense, and risk they incur in the carriage of the goods.

3. The third transaction under this head relates to two hampers of meat and one flat of butter sent on the *6th of May, 1844, [*641
before the passing of the 7 & 8 Vict. c. iii.,—the miscellaneous

class in scale-bill A. being then applied to the public. The company claim to charge these goods according to the miscellaneous class, because they were not of the same *kind*. If meat and butter are goods of one *kind* or *class*, they had no right thus to charge them. "Kind" and "class" are synonymous terms, as here used; and if so, meat and butter, being in the same class in the scale-bill, ought to have been charged upon the aggregate weight according to that class. If there be any ambiguity, the words, being the words of the company, and imposing a duty upon the public, are like doubtful and ambiguous words in an act of parliament, to be construed most strongly against the company, and in favour of the public.

4. The next transaction differs from the preceding only in this, that it took place *after* the passing of the 7 & 8 Vict. c. iii.

5. The fifth transaction under the first head has this further objection, that the company apply the miscellaneous or sixth class charge in scale-bill A. to carriers, and not to the public. This is an inequality of which the plaintiffs have a right to complain. [JERVIS, C. J.—If the former decision of this court in *Parker v. The Great Western Railway Company* is to govern us, the question upon this head of claim is reduced to the construction of the act of 7 & 8 Vict. c. iii. s. 50.] That is so: and the case expressly excludes all dissimilarity, except that which might arise from the fact of the party sending the goods being a carrier.

II. Under the second head of claim, which refers to the time when scale-bill B. was in operation, the first transaction will follow the fate of the second transaction under the first head, and the second transaction under this head will be governed by the fifth transaction under the former head.

*642] *III. 1. The first transaction under the third head of claim, relates to bales of bacon consigned to five different persons. For a portion of this, which exceeded 500lbs. weight, going to one person, the charge was correct; but, as to the rest, it was not justified by the 171st section of 5 & 6 W. 4, c. cvii. The goods were aggregate of one kind or class, and therefore should have been lumped, as the case finds would have been done if sent by one not a carrier.

2. The only difference between the next transaction and the former under this head, is, that here the proviso does not apply.

3. The third transaction under this head does not materially differ from the other two.

IV. 1. The first transaction under the fourth head, has reference to the additional charge of 2*d.* per package, which, it is submitted, though properly charged on the tonnage-scale, is not chargeable on the parcels-scale.

2, 3. The second transaction is open to the charge of inequality, the additional 2*d.* per package not being imposed upon the public; and the

third is similar, unless the circumstance of Parker being a carrier made a difference.

V. The fifth head of claim was for a reduction from the company's charges, as a compensation for the weighing, loading, and unloading, or for so much thereof as was performed by Parker's men, between the 1st of May, 1844, and the end of May, 1846. This applies more particularly to the "meat mornings," when the company's staff was inadequate to the performance, without such assistance, of the accumulated work. The former decision of this court shows that the carriers were entitled to compensation for the assistance thus rendered by them.^(a) [JERVIS, C. J.—That only shows that the *company are not justified in excluding one carrier from such an arrangement.] This [*643 falls within the remark which fell from ALDERSON, B., in *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 416,†—"Can it be said that Pickford & Co. and Mr. Horne are charged equally, when they are charged the same sum in one case for carriage *plus* portorage, and in the other case for carriage alone?" The 1 Vict. c. xcii., s. 44, empowers the company to demand a reasonable charge for the loading and unloading or weighing any articles, matters, or things which they may be *required* to load, unload, or weigh. Here, they are not required to do anything of the sort: on the contrary, the ticking-off notes require the carrier to classify and weigh. [JERVIS, C. J.—He must weigh, for his own convenience. Any saving of trouble or expense arising to the company from that, cannot be money had and received.] Then, the withholding from Parker the allowance of 10 per cent., during the continuance of the company's contract with Kent, was clearly an inequality of charge. [JERVIS, C. J.—When they found they were doing wrong in making this allowance to Kent, they discontinued it.] They broke their agreement with Kent, were sued, and paid 500*l.* by way of compromise. [JERVIS, C. J.—They paid damages for *not* making him the allowance.] It does not lie in the company's mouth to say that they made an illegal contract with Kent.

VI. The last head of claim arises upon the construction of the 3 & 4 W. 4, c. 42, s. 28.^(b) It may be conceded that interest would not be recoverable here, unless given by that statute. It is submitted, however, that, inasmuch as the action is for a debt which a jury may render certain, it is within the act.

(a) See 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott, N. R. 835.

(b) Which enacts, "that, upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided, that interest shall be payable in all cases in which it is now payable by law."

*644] *Keating* (with whom were *Channell*, Serjt., *Hoggins*, and *Cripps*), for the defendants.—[JERVIS, C. J.—As to the fifth head of claim, you need not trouble yourself.] The arbitrator having found, that, as to the first four heads, a distinction has been made between the public and Parker, the defendants will not, after the decision of this court in *Parker v. The Great Western Railway Company*, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott, N. R. 835, contend that that course can be justified, unless it can be made out that there is a difference of circumstances, within the 7 & 8 Vict. c. iii., s. 50, arising from the fact of Parker being a carrier. The contest resolves itself into a question as to small parcels sent to different consignees. Under the 171st section of the 5 & 6 W. 4, c. cvii., the company conceived it to be the intention of the legislature that they should receive additional compensation for the increased risk incurred by the transmission of small parcels; and that they had power to prevent that intention from being defeated in the case of carriers. But, in consequence of the decision of this court, the company went to parliament for an extension of power. Accordingly, the 7 & 8 Vict. c. iii., repeals the former provisions, and re-enacts them with the single exception of the addition of the words “and under the like circumstances.” The question is, whether a number of different parcels brought by a carrier can be said to be carried by the company under the like circumstances as when brought to them to be carried for one not a carrier. [JERVIS, C. J.—The case expressly finds that the company’s labour and expense in carrying several packages for different ultimate consignees, were no greater with respect to carriers than with respect to other persons. The only difference of circumstances seems to be, that the company get the services of the carrier, and charge him more.] Down to the time of the passing of the 7 & 8 Vict. c. iii., the company did charge the miscellaneous class goods to the public, as to carriers. [*Brown*.—The case finds that they lumped for the public, but not for carriers.] Aggregate of one kind or class, in the scale-bill, must mean kind or description. [MAULE, J.—By “class,” the company probably mean, things paying one rate of tonnage.] If goods paying different rates of tonnage are sent together, they are placed in the sixth or miscellaneous class. [JERVIS, C. J.—The company cannot charge parcel-rate, and put the goods in a class as tonnage goods also.]

As to the claim for interest,—The company were entitled to a notice of action: *Kent v. The Great Western Railway Company*, 3 C. B. 714 (E. C. L. R. vol. 54). The written demand of interest was not served until after notice of action. This is clearly not the debt or sum certain which was contemplated by the 3 & 4 W. 4, c. 42, s. 28.

Brown, in reply.—It cannot be contended that the withholding of interest was “a thing done or omitted to be done in pursuance of the

act.”(a) Besides, want of notice of action must be pleaded: *Davy v. Warren*, 14 M. & W. 199.† [JERVIS, C. J.—How do we know whether it is pleaded or not?] The arbitrator has stated the pleadings. [JERVIS, C. J.—The plea is “general issue, by statute.”] The 5 & 6 Vict. c. 97, s. 3, was passed before this action was *brought: therefore, [*646 the words “by statute” will not help the defendants.

Cur. adv. vult.(b)

The Court being about to give judgment, *Brown*, for the plaintiffs, suggested, that, the reference in this case being a reference of “all matters in difference between the parties,” generally, the arbitrator might award the 10 per cent. allowance claimed by the plaintiffs under the fifth head, although it could not be recovered in an action for money had and received, if the court should think it recoverable in any other way.

JERVIS, C. J., now delivered the judgment of the court: There are six heads of claim in this case; each of the first four branching out into various claims partaking of certain distinctions: but in substance, the claims upon the first four heads are reduced to three.

The first branch is in respect of charges made for a period anterior to the coming into operation of the act of 7 & 8 Vict. c. iii. That is disposed of,—as was admitted in the course of the argument,—by the finding of the arbitrator. He finds, that, in respect of the various claims under the first four heads, certain scale-bills were in force before the passing of that act, and that, under those scale-bills, the same classes of goods would have been carried for the public at a less rate of charge than that for which they were carried for Parker,—that they were carried for the public at the price which Parker contends he ought to have paid; and that he paid the sums demanded under protest. Now, that being so, it was conceded, in the course of the argument, that that would bring the whole of those four cases within the *decision of this court in *Parker v. The Great Western Railway Company*, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott, N. R. [*647 835, which is binding upon us. The plaintiffs, therefore, are entitled to the judgment of the court upon this part of the case.

The second branch disposes of the remainder of these four heads, with one single exception arising from the 7 & 8 Vict. c. iii. s. 50. That section enacts “that it shall be lawful for the Great Western Railway Company, whenever they shall act as carriers, or shall provide locomotive or steam power or carriages for the conveyance of passengers, animals, goods, wares, merchandise, articles, matters, or things, to charge for such locomotive or steam power and carriages such sum (not exceeding the sums, if any, limited by the recited acts, or any of them), and

(a) 5 & 6 W. 4, c. cvii., s. 123.

(b) This case was argued before *Parker v. The Great Western Railway Company*, ante, p. 545; but the judgment in that case was delivered first.

that either per ton or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, as they shall think expedient: provided always, that, in whatever way the said charges are made, *they shall be made equally* to all passengers, and to all persons, in respect of all animals, and of all goods, wares, merchandise, articles, matters, and things of a like description and quality, and conveyed in or propelled by a like carriage or engine, passing only over the same portion of, and over the same distance along, the said railway, *and under the like circumstances*; and no reduction or advance in any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person." The arbitrator finds that the only "difference of circumstances" here arises from the fact of Parker being a carrier; and that, if the same goods, under the same circumstances in other respects, had been tendered to the company, they would have carried them for a less sum. The question, therefore, is this,—is the fact of Parker being a carrier a *different circumstance*? or, are the goods carried under *different circumstances* when they

*648] *are carried for anybody else?* Now, looking at the words of the 50th section of the 7 & 8 Vict. c. iii., I cannot say that they are. The goods carried are of the like quality, and they are carried along the same portion of the railway, and by the same power, and at the same time, and subject to the same risks and liabilities. In the case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399,† it was expressly decided that the fact of a person being a carrier made no difference in the circumstances. The words of the act of parliament in that case(a) were "under the *same circumstances*,"—which are nearly identical with those now in question.

But, under the first five claims, there arises another point. Under the sixth class in the scale-bill, the company have classed by tonnage goods coming under the first, second, third, fourth, and fifth classes, which, though they might have been charged as parcels, are charged by the first scale-bill as "miscellaneous goods" under the sixth class, at a higher rate of tonnage; and the company have by their construction excluded carriers, thereby making a difference between them and the public. In order to justify this, the company say that "kind" and "class" in the scale-bill mean different things, and therefore, when they charge the public, they put into the sixth class goods which are not goods of the same *kind* though of the same *class*. In the course of the argument, it was pointed out by my Brother MAULE what was the reason for the distinction, viz. that they had the weighing and the extra trouble. If they are goods all of one kind, they are put into one scale; if of different classes, you would not weigh them separately, but altogether, and put them under the sixth class; therefore, the word "class" is larger than the word "kind," and the company having restricted it by the more limited meaning of the word "kind," were wrong in

(a) 3 Vict. c. xlix., s. 26.

charging Parker at the rate of *3s. 5d., when they would have charged the public only 3s. 2d. [*649

This, I think, disposes of the four first heads of claim.

Under the fifth head of claim, it is contended that Parker was entitled to an allowance of 10 per cent., or something less than 10 per cent., for the assistance afforded to the company by his men in loading and unloading on what are called the "meat mornings." The plaintiffs present that claim on two grounds,—first, they say the carrier has done work for the company which the public did not do, and which the company did for the public, and therefore that he was entitled to compensation for it. The court is of opinion that that is not so; as was intimated in the former case just decided. But further, the plaintiffs say, we are entitled to a reduction, on the ground of *inequality*, because the company entered into a contract with Kent to make him an allowance of 10 per cent. prior to the decision of this court in 1844; and, because they would not, after that decision, carry that agreement into effect, they paid him damages in an action which he brought against them, and 500*l.* more; and so, in truth, they have been making him, through the intervention of a jury, an allowance which they have withheld from Parker,—which, it is said, brings the case within the principle laid down in the judgment of TINDAL, C. J., in *Parker v. The Great Western Railway Company*. The answer to that is this: the company have paid Kent damages for the breach of the contract, in withholding the stipulated allowance. How can that be said to constitute, as between Parker and Kent, an inequality of charge? The company did not do that of which the plaintiffs complain: they paid damages for *not* doing it.

The only remaining question is this,—whether the arbitrator is at liberty, if he shall think fit, to allow interest on the sums recoverable in this action. The *plaintiffs contend that Parker has from the commencement been paying a sum certain to the company in [*650 excess of the lawful charge upon every transaction. There is a demand in writing of the debt, and a demand of interest under the statute 3 & 4 W. 4, c. 42, s. 28. This, therefore, is a sum certain with respect to which a demand has been made for principal and interest; and the arbitrator may, if he thinks fit, give interest. But it is said, on the other hand, that the arbitrator cannot do this, because the company's act of parliament entitles the company to a notice of action, and the notice of action here does not demand interest. There are two answers to this: one is, that there is no plea of want of notice of action, but only a plea of never indebted "by statute,"—the effect of which is altered by Sir F. POLLOCK's act, 5 & 6 Vict. c. 97, s. 3. The defendants had, therefore, no right to rely upon the general plea: they are bound to plead specially the want of notice of action. A further answer would be, that this is a submission, not only of the action, but of all matters in

difference; and the interest would be *a matter in difference*, whether demanded by the notice of action or not. If the arbitrator could give it, he might give it in that way, notwithstanding the want of claim of interest in the notice.

On these grounds, we are of opinion that this case may be shortly disposed of; for, it being admitted, in the course of the argument, that the matter turns upon the distinction I have pointed out, then we are precluded from any further argument, by the finding of the arbitrator upon the different heads.

Keating.—Interest, of course, can only be allowed from the date of the demand.

JERVIS, C. J.—That is regulated by the statute.

Rule accordingly.

*651] *DORSETT v. ASPDIN. Nov. 19.

Where the plaintiff has, upon the defendant's default, in *due time* delivered the demurrer-books for him to the two junior judges, the defendant cannot be heard, but the plaintiff will have judgment, unless the defendant appears and pays for the books so delivered for him. In this court, a previous notice of the plaintiff's intention to take the objection, is not required.

THIS was a demurrer to a plea. The plaintiff having delivered all the demurrer-books,

Crompton, after he had been heard in support of the demurrer, and after *Massey Dawson* had actually commenced his argument in support of the plea, objected that the defendant ought not to be heard until he had paid for the demurrer-books delivered by the plaintiff on his default.

Massey Dawson, *contra*, submitted that the objection came too late, and that, for anything that appeared to the court, the defendant might already have paid for the books. [JERVIS, C. J.—Has the plaintiff complied with the conditions which entitle him to make the objection? He must have delivered the books which the defendant ought to have delivered, on the day following that on which the defendant's default was made; *Hooper v. Woolmer*, 10 C. B. 370 (E. C. L. R. vol. 70): and, according to *Sandall v. Bennett*, 2 Ad. & E. 204 (E. C. L. R. vol. 29), (a) he should give notice to the defendant before the objection is made in court.]

Crompton.—The rule of Hilary Term, 4 W. 4, r. 7, provides, that, "four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer-book, special case, or special verdict, to the lord chief justice of the King's Bench or Common Pleas, or *652] lord chief baron, as the case may be, and the senior judge of the court in which the action is brought; and the defendant shall

(a) In that case, it would seem, the default was brought to the notice of the court by affidavit.

deliver copies to the other two judges of the court next in seniority; and, *in default of either party*, the other party may, *on the day following*, deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies." The plaintiff has literally complied with that rule: there is nothing which requires him to give the defendant notice. [JERVIS, C. J.—It is only fair and proper that notice should be given.] The defendant knows what the rule of court requires of him, and he knows that he has been guilty of a default. [Master Cancellor reported that it had never been the practice in this court to give notice.]

It appearing, upon inquiry of the judge's clerks, that all the demurrer-books had been delivered by the plaintiff's attorney, and in due time,

JERVIS, C. J., said: It appears to be the uniform practice, that, where the plaintiff has, upon the defendant's default, in due time delivered the demurrer-books for him to the two junior judges, he is entitled to judgment, unless the defendant appears and pays for the books so delivered: *Scott v. Robson*, 1 C. M. & R. 29;† *Wilton v. Scarlett*, 1 D. & L. 810. That being so, and there being, as the master reports to us, no authority, in this court, for requiring the plaintiff to give the defendant notice of his intention to take the objection, we think the defendant cannot now be heard.

**Dawson* asked, that the case might be allowed to stand over. [*653]

JERVIS, C. J.—You may perhaps be let in, if you come to-morrow with an affidavit of merits.

Dawson, on the following day, produced an affidavit; but, the court not deeming it satisfactory, there was

Judgment for the plaintiff.(a)

(a) See *Sheddon*, app., Butt, resp., ante, p. 27, where the court refused to hear an appeal under the Registration Act, 6 & 7 Vict. c. 18 (or to allow it to stand over) the appellant having failed, on the respondent's default, to deliver copies of the case to the two junior puisne judges.

HOWARD v. BARNARD. Nov. 4.

The court refused, in an action for the negligent construction of a building, whereby it fell and injured the plaintiff, to grant a new trial, on the ground that the jury had given merely nominal damages,—there being no reason for supposing them to have been actuated by improper motives.

THIS was an action upon the case brought by the plaintiff to recover damages for an injury sustained by him in consequence of the negligent construction of a stand at Epsom, whereby it broke down.

The cause was tried before JERVIS, C. J., at the last Assizes for Surrey, when it appeared, that the defendant was the owner of a stand on the race-course at Epsom; and that, in consequence of its imperfect construction, it broke down whilst the plaintiff and a number of other persons were on it, and the plaintiff received some severe contusions.

The jury,—a special jury,—returned a verdict for the plaintiff, damages one shilling.

Channell, Serjt., on behalf of the plaintiff, now moved for a new trial.

*654] He submitted that the verdict, if not *perverse, was clearly against the evidence, as to the damages which the plaintiff was entitled to. [JERVIS, C. J.—It could only be on payment of costs.] In *Armstrong v. Haley*, 4 Q. B. 917 (E. C. L. R. vol. 45), which was an action for injury by negligence of the defendant's servant, the jury having found a verdict for the plaintiff, with one farthing damages, though it appeared that the plaintiff's thigh was broken, and that he had paid 10*l.* for surgical attendance, the Court of Queen's Bench granted a new trial, on payment of costs. [TALFOURD, J.—This is one of the cases in which there could be no certificate under Lord DENMAN's act, 3 & 4 Vict. c. 24. JERVIS, C. J.—If it had been, I certainly should not have certified.] The jury clearly have miscarried in their estimate of the damages.

JERVIS, C. J.—I think there ought to be no rule in this case. I saw nothing improper in the conduct of the jury. It was peculiarly their province to determine the amount of compensation the plaintiff was entitled to receive for the injury he had sustained. I think it would be establishing a bad precedent to interfere with their discretion.

MAULE, J.—I am of the same opinion. This is not like the case of the loss of a leg. The plaintiff, as the jury seem to have thought, was not much hurt, and is now as good a man as ever. Another jury would in all probability not give him 20*l.*; and that would bring it within the rule upon which we always act in these cases,—not to grant a new trial as for a verdict against evidence (which could only be upon payment of costs, and therefore not worth while), where the damages are of so small amount.

*655] *WILLIAMS, J.—I am of the same opinion. There is no ground for imputing improper motives to the jury, and therefore no ground upon which we can interfere.

TALFOURD, J., concurred.

Rule refused.

MARSHALL v. THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY. Nov. 15.

A declaration in case against a railway company for the loss of a passenger's luggage, stated that the defendants received the passenger to be safely carried, together with his luggage, "for reward to the defendants in that behalf;" it then alleged that it was the defendant's duty safely and securely to carry the plaintiff and his luggage, and averred a breach of that duty, whereby the luggage was lost:—

Held, that the action being founded on the breach of duty, and not on contract, it was not necessary to allege or to prove that the reward was to be paid *by the plaintiff*; but that the plaintiff was entitled to recover, although it appeared that the fare was paid by the plaintiff's master, with whom he was travelling at the time.

And, *semble*, that if the allegation in the declaration did import that the payment was to be made *by the plaintiff*, the payment by his master on his behalf would be a payment by the plaintiff.

THIS was an action upon the case brought by the plaintiff to recover from the defendants, the York, Newcastle, and Berwick Railway Company, damages for the loss of a portmanteau containing articles of wearing apparel.

The declaration stated that the defendants, before and at the time of the committing of the grievances thereafter mentioned, were the owners and proprietors of a certain railway, to wit, the Newcastle and Berwick Railway, and of certain carriages used by them for the carriage and conveyance of passengers, goods, and chattels in, upon, and along the said railway, and in, upon, and along certain other railways, from a certain place, to wit, Darlington, to a certain other place, to wit, London, for *hire and reward to them, the defendants, in that behalf; [*656 that thereupon the plaintiff, theretofore, to wit, on, &c., at the request of the defendants, became and was a passenger in one of their said carriages, to be by them safely and securely carried and conveyed thereby, together with his luggage, on a certain journey along the said railways, to wit, from Darlington aforesaid, to London aforesaid, for reward to the defendants in that behalf; that the defendants then received the plaintiff as such passenger as aforesaid, together with his luggage, to wit, a certain portmanteau containing divers goods of the plaintiff, to wit, &c., &c.; and that thereupon it then became and was the duty of the defendants to use due and proper care that the plaintiff and his luggage should be safely and securely carried and conveyed by, upon, and along the said railway as aforesaid, from Darlington aforesaid to London aforesaid; but that the defendants did not use due care in that behalf, and that, by their carelessness, negligence, and default, the said luggage became wholly lost to the plaintiff, &c.

The defendants pleaded,—first, not guilty,—secondly, that the plaintiff did not become, nor was he, a passenger in one of the carriages of the defendants, to be by them safely and securely carried thereby, with his luggage, on the said journey, *modo et formâ*,—thirdly, that the defendants did not receive the said luggage of the plaintiff for the pur-

pose in the declaration mentioned *modo et formâ*; concluding to the country.

The cause was tried before JERVIS, C. J., at the sittings at Westminster after the last term. It appeared that the plaintiff was valet to Lord Adolphus Vane, that, in the month of September, 1850, he was travelling to London with his master, that the portmanteau in question was placed in the railway train at Darlington, and lost on the road. It appearing, however, upon the evidence of Lord Adolphus Vane, that his *657] lordship had himself taken *and paid for the tickets for himself and his servant, it was submitted, on the part of the defendants, that, the action being founded upon contract, and the contract having been made with the master, the master and not the servant should have sued.

The lord chief justice nonsuited the plaintiff, reserving to him leave to move to enter a verdict for 30*l.*,—the agreed value of the portmanteau and its contents,—if the court should be of opinion that the action was well brought.

Humfrey, accordingly, on a former day in this term, obtained a rule nisi. He referred to *Gladwell v. Steggall*, 5 N. C. 733, 8 Scott, 60, and *Skinner v. The London, Brighton, and South Coast Railway Company*, 5 Exch. 787.†

Knowles and *Hugh Hill* now showed cause.—This is an action founded upon a contract: *Newberry v. Colvin*, 7 Bingh. 190 (E. C. L. R. vol. 20), 4 M. & P. 876. The declaration alleges that the defendants, in consideration of hire and reward to them (which must necessarily intend *to be paid by the plaintiff*), undertook safely and securely to carry the plaintiff and his luggage; and then alleges a breach of that contract. So much is this in the nature of an action of contract, that, according to *Powell v. Layton*, 2 N. R. 365,—overruling *Govett v. Radnidge*, 3 East, 62,—the non-joinder of a party as defendant would have been pleadable in abatement formerly. Sir JAMES MANSFIELD, in that case, says: “The duty of a servant, or the duty of an officer, I understand; but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract.” [WILLIAMS, J.—All the authorities are considered in *Pozzi v. Shipton*, 8 Ad. & E. 968 (E. C. L. R. vol. 35), 1 P. & D. 4.] Although, at first sight, that would seem to be an *658] *authority against the defendants, it will be found upon a closer inspection to have no material bearing here. There was no allegation there, that the goods were delivered at the request of the defendants. The ground of the decision appears from the judgment delivered by PATTESON, J., who says: (a) “The form of the declaration is in case, and differs from that used in *Bretherton v. Wood*, 3 B. & B. 54 (E. C. L. R. vol. 7), 6 J. B. Mocre, 141 (E. C. L. R. vol. 17), in this, that it contains no positive averment that the defendants were carriers:

(a) 8 Ad. & E. 974 (E. C. L. R. vol. 35).

whereas, in *Bretherton v. Wood*, there was an averment that the defendants were proprietors of a stage-coach for the carriage and conveyance of passengers for hire from Bury to Bolton. The present declaration states simply that the plaintiff delivered to the defendants, and the defendants received from the plaintiff, goods to be carried for hire from A. to B. It is therefore consistent with the defendants' being common carriers, or being hired on the particular occasion only." The declaration here is in the same form as in *Bretherton v. Wood*. In that case, the party bringing the action was the party with whom the contract was made, and by whom the goods were delivered to the carrier. Here, the plaintiff had nothing whatever to do with the contract with the company. [WILLIAMS, J.—It was an action upon the custom of the realm, for failure in performance of a public duty. The foundation of the action against a surgeon for negligence, is, not the contract or employment, but the breach of a public duty.] The subject is very much discussed in *Ross v. Hill*, 2 C. B. 877 (E. C. L. R. vol. 52), where the judgment of TINDAL, C. J., shows that the degree of care is different in the case of a gratuitous bailee from that which is required from a bailee for reward. [WILLIAMS, J.—In *Pippin v. Sheppard*, 11 Price, 400, it was held not to be a ground of demurrer to a *declaration [*659 in an action on the case by a man and his wife against a surgeon, for an injury to the wife by reason of the defendant's improper and unskilful treatment, that it is not stated,—in the averment that the defendant was retained and employed as surgeon for reward to be to him paid,—*by whom* he was so retained, or *by whom* he was to be paid: it is enough to aver that the defendant *was retained* as a surgeon, and *entered upon the cure*. Chief Baron RICHARDS there says: "I am really at a loss to know how any declaration should be framed in this case so as to be right, if this be wrong. The defendant, being a surgeon, undertakes to the public to cure wounds and other ailments of the human system, and professes himself ready to be employed by any one for that purpose. The declaration states that he was as a surgeon employed, for a reasonable reward, to attend and cure this patient, that he entered on the treatment, &c. It is, therefore, I think, sufficiently stated that the defendant undertook the cure. Then, negligence and improper treatment are charged, and the injurious effects of such misconduct are averred. The question then is, to whom was the injury done? If a stranger had sent the defendant as a surgeon to cure this woman, undertaking to pay him for his attendance, *he* would not be entitled to recover or sue for damage and injury done to her, in consequence of the surgeon's negligence and want of skill. From the necessity of the thing, the only person who can properly sustain an action for damages for an injury done to the person of the patient, is, the patient himself; for, damages could not be given on that account to any other person, although the surgeon may have been retained and

employed by him to undertake the cure. The party employing the surgeon can have nothing to do with this action."'] No doubt, the servant might maintain an action against the company for a personal injury, such as, the breaking of a leg, or *the like. But, here, the *660] master, who may be said to have been intrusted with the portmanteau, and who made the contract, is the only proper person to sue for a breach of it. It may be said that this doctrine would impose undue hardship on the servant; but there are many difficulties arising from the relation of master and servant, for which the law affords no remedy: some of these are illustrated by the cases of *Priestly v. Fowler*, 3 M. & W. 1,† and *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 343.† The allegation in the declaration clearly was not proved.

Humfrey and Willes, in support of the rule.—It is difficult to see how the declaration in this case could have been framed otherwise than it is. It is like that in *Wyld v. Pickford*, 8 M. & W. 443.† The company undertook safely to carry the plaintiff's portmanteau, for reward,—no matter by whom to be paid; and, in the performance of that duty, they were guilty of negligence. That is exactly the case of *Gladwell v. Steggall*, 5 N. C. 733, 8 Scott, 60. There, a declaration in case against a surgeon for negligence alleged that *the plaintiff*, at the request of the defendant, *had employed the defendant* to bestow the care, &c., of him the defendant, in the profession and business of a surgeon and apothecary, &c., and the defendant then accepted and entered upon such employment as such surgeon; and then proceeded to allege the duty resulting from such retainer: and it was held, that it was immaterial *by whom* the defendant was retained, though a distinct issue was taken by the plea upon the retainer; and that, if the allegation of employment *by the plaintiff* was material, it was supported by proof that the plaintiff (a child about twelve years old) submitted to and received the *661] defendant's *attendance. And TINDAL, C. J., said: "The declaration is not framed as on a contract, but for breach of a duty resulting from an alleged employment of the defendant by the plaintiff. One observation that naturally suggests itself, is, that none but the present plaintiff could recover damages in respect of the personal suffering inflicted upon her through the defendant's negligence and want of skill. Another observation is, that the form in which the issue is taken does not at all vary the extent of the defendant's duty: he is bound to exercise the same degree of care and skill, by whomsoever he might be called in." The real liability of the defendants arises, no doubt, out of their being common carriers. The fallacy is in supposing that "for reward" necessarily means, for reward "to be paid *by the plaintiff*." And if it *were* necessary, a payment by the master, in pursuance of a stipulation tacitly entered into with the servant at the time of hiring, is a payment by the servant. If necessary, the

words "for hire and reward" might have been omitted. The declaration alleges that the company received the portmanteau as common carriers; and they would not be the less liable for the negligent loss of it, because they carried it gratuitously. In the case of the surgeon, there would be nothing to prevent the parent from maintaining an action on the contract, and the child from having another action for the breach of duty. Suppose, here, the plaintiff, besides the loss of his portmanteau, had suffered amputation of a limb through the carelessness of the defendants,—by whom would the action for that have been brought? [JERVIS, C. J.—Mr. *Hill* admits that in that case the servant must have sued. *Hill*.—The master could of course maintain no action for the personal suffering of his servant.]

JERVIS, C. J.—I am of opinion that the rule must be made absolute to enter a verdict for the plaintiff for the *damages agreed upon at the trial. Three points have been incidentally made in the [*662 course of the argument. In the first place, it is said, that, under the circumstances of this case, no action will lie by the plaintiff against these defendants, whatever the form of the declaration. But the admissions made in the course of the argument, and the authorities cited, place the defendants in a difficulty; for, it is conceded,—and indeed the concession could not have been avoided,—that if, under the same circumstances, the plaintiff had sustained the loss of a limb, or any other personal injury, he alone could have sued. It is said that that is because the master could not maintain an action in respect of the personal suffering of the servant, though he might in respect of the loss of service. But, upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any *contract* between him and the company, but by reason of a duty implied by law to carry him safely. If, under the circumstances of this case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no reason why he should not also recover in respect of the loss of his luggage. The breach of duty is the same in the one case as in the other. The action therefore will lie, if the cause of action be properly alleged in the declaration. But it has been contended, on the part of the defendants, that the form of the declaration in this case so ties up the plaintiff, and restricts the liability of the defendants, that this action cannot be maintained; because the declaration alleges that the defendants received the plaintiff and his luggage to be carried for reward to them in that behalf,—which means, according to the authorities, to be paid *by the plaintiff*. To that argument, there are two answers. In the first place, there is no denial on the record; for, a traverse *modo et forma* substantially denies merely the allegation traversed; and therefore the traverse of the receipt of the *plaintiff and his luggage, to be carried for hire and reward, [*663 by the defendants, did not put in issue *by whom the reward was*

to be paid. And, further, if that *were* put in issue, the words of the allegation must be construed with reference to the rest of the declaration. If payment *by the plaintiff* be necessary, the general allegation that the defendants undertook to carry the plaintiff and his luggage for hire and reward, will be understood to mean, to be paid by the plaintiff. But, if the liability of the defendants arises, not from the contract, but from a duty, it is perfectly unimportant by whom the reward is to be paid; for, the duty would equally arise, though the payment was by a stranger. I therefore think, that, upon the proper construction of the declaration, the objection does not arise. It becomes unnecessary to advert to the point suggested by Mr. *Willes*, that the payment by the master on the servant's behalf was a payment by the servant sufficient to sustain the averment, even construing it as it was contended on the part of the defendants it ought to be construed. The rule must be absolute.

WILLIAMS, J.(a)—I am of the same opinion. The case was, I think, put upon the right footing by Mr. *Hill*, when he said that the question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railway company. His proposition was, that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward *to be paid by the plaintiff*, and that the traverse of that part of the declaration involves a traverse of the payment *by the plaintiff*. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge* and ending with *Pozzi v. Shipton*, establishes *that an action of this sort is, in substance, not an action of *contract*, but an action of *tort* against the company, as carriers. That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort, is in Fitzherbert's *Natura Brevium*, *Writ de Tr. spass sur le Case*," where it is said:(b) "If a smith prick my horse with a nail, &c., I shall have my action upon the case against him, without any warranty by the smith to do it well; for, it is the duty of every artificer to exercise his art rightly and truly as he ought." There is no allusion there to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary. Then, the traverse not in terms involving a denial that the payment of hire and reward was to be made by the plaintiff, does not involve a denial that the contract was with the plaintiff, unless that is material to the validity of the declaration. As, however, that allegation clearly was not material, the traverse *modo et formâ* did not make it necessary for the plaintiff to prove it. Even if the allegation in the declaration means only that the plain-

(a) Mr. Justice MAULE and Mr. Justice TALFOURD were sitting in the Court of Criminal Appeal.

(b) Page 94 D.

tiff and his luggage were to be carried for hire and reward to be paid by him, I am of opinion that the plaintiff was entitled to the verdict, because I think he proved the issue. I incline to think he proved it in the larger sense: the money having been paid on his behalf by Lord Adolphus Vane, his master, may fairly be said to have been paid *by the plaintiff*. But it is not necessary for the disposal of this case to decide that. If the payment *was* put in issue, all that the allegation means, is, that the reward was to be paid by some one: it was unnecessary to prove payment by the plaintiff himself. That is abundantly shown by the case of *Pippin v. Sheppard*, 11 Price, 400, to which I referred in the course of the argument, where the court got rid of the demurrer by *holding it to be immaterial by whom the defend- [*665 ant was retained, or by whom he was to be paid for his attendance. Assuming the traverse here to involve a denial of the reward, the allegation was amply proved. Rule absolute.(a)

(a) *Knowles* had proposed to urge another point, viz. that the company were altogether exempted from liability in respect of personal luggage, by reason of the 138th section of the 6 & 7 W. 4, c. cv., the act for incorporating The Great North of England Railway Company. That section enacted "that, without extra charge, it shall be lawful for every passenger travelling upon or along the said railway, to take with him his articles of clothing, not exceeding 40lbs. in weight, and four cubic feet in dimensions; and the said company shall in no case be in any way liable or responsible for the safe carriage or custody of, or for any loss of or injury to, any articles, matters, or things whatsoever carried upon or along the said railway with, or accompanying the person of, or belonging to, any passenger, or delivered for the purpose of being carried: Provided always, that nothing herein contained shall in any case extend to charge or make liable the said company further or in any other case than where, according to the laws of this realm for the time being, stage-coach proprietors and common carriers would be liable; nor shall anything herein contained extend in any degree to deprive the said company of any protection or privilege which either now or at any time hereafter common carriers or stage-coach proprietors have or may have, but the said company shall from time to time and at all times have and be entitled to the benefit of every such protection and privilege." The railway constructed under that act was, under the provisions of the 9 & 10 Vict. c. cxxlii., leased to the now defendants, by their then name of The Newcastle and Darlington Junction Railway Company, together with all its powers, privileges, and immunities.

Upon the above clause being cited, JERVIS, C. J., observed:—The company received the plaintiff's portmanteau to be carried safely, though they did not warrant. The act of parliament would not justify them in throwing it overboard. There may still be a duty imposed upon them to carry safely, notwithstanding they are not insurers.

The point, however, failed for want of having been properly taken at the trial.

Where a suit was brought against a railroad company, by a person who was injured by a collision, it was correct in the court to instruct the jury that if the plaintiff was lawfully on the road, at the time of the collision, and the collision and consequent injury were caused by the gross negligence of one of the servants of the defendants, then and there employed on

the road, he was entitled to recover notwithstanding the circumstances, that the plaintiff was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger cars: *The Philadelphia and Reading R. R. Co. v. Derby*, 16 Howard U. 3. Rep. 468.

*666]

*WICKENS v. GOATLY. Nov. 8.

A replication to a plea of set-off, stated that the defendant, being in custody within the walls of "the Queen's prison," at the suit of A. B., for debt, duly and according to the provisions of the statute 1 & 2 Vict. c. 110, petitioned the insolvent debtors court for relief, and stated in his petition, that he was willing that his estate and effects should be vested in the provisional assignee of that court; that the petition was duly subscribed by the defendant, and filed of record; and that the court, in pursuance and according to the statute, ordered that all the estate, &c., of the defendant should be vested in the provisional assignee; and that, by virtue of the statute, the debts and causes of set-off became vested in the said provisional assignee:—Held, sufficient, without proceeding to allege all the requisites of the 35th section of the act to give the insolvent debtors court jurisdiction.

The court will take judicial notice that "the Queen's prison,"—the prison of the court,—is in England.

ASSUMPSIT. The fifth and sixth counts were upon two promissory notes for 25*l.* each, made by the plaintiff, dated respectively the 15th of January, 1850, and payable to the plaintiff at three and six months after date respectively: the seventh count was for 500*l.* money lent, money paid, money had and received, interest, and money found due from the defendant to the plaintiff upon an account stated.

To these counts, the defendant pleaded,—ninthly, a set-off of 500*l.* for work and labour as an attorney for the plaintiff, and the like sum for money paid and money found due from the plaintiff to the defendant upon an account stated.

To this plea, the plaintiff replied, that, after the plaintiff became indebted to the defendant as in that plea alleged, and before the commencement of this suit, to wit, on the 10th of April, 1849, the defendant, then being a prisoner in actual custody within the walls of a certain prison of our lady the Queen, to wit, the Queen's prison, upon process at the suit of one John Pook, for the recovery of a certain debt then due from the now defendant to the said John Pook, did, within fourteen days next after the commencement of the said actual custody of the now defendant, to wit, on, &c., duly and according to the directions and provisions of a certain statute made and passed, *667] &c. (1 & 2 Vict. c. 110), apply by petition in a summary way to the court for the relief of insolvent debtors in the said act mentioned, for his discharge from such custody as aforesaid, according to the provisions of the said act; in which petition the defendant stated that he was willing that all his real and personal estate and effects should be vested in the provisional assignee for the time being of the estate and effects of insolvent debtors in England, according to the provisions of the said act, and prayed to be discharged from custody, and to have future liberty of his person, against the demands for which the defendant was then in custody, and against the demands of all other persons who should be, or claim to be, creditors of the defendant at the time of the presenting of the said petition; and which said petition was then duly subscribed by the defendant, and was forthwith, to wit, on, &c., filed of record in the

said court, pursuant to the directions in the said statute contained: that, on the said filing of the said petition, and before the commencement of this suit, to wit, on the 26th of April, 1849, the said court, in pursuance and according to the said statute, ordered that all the real and personal estate and effects of the defendant, both within this realm and abroad, except the wearing apparel, &c., and also all the future estate, right, title, interest, and trust of the defendant in or to any real and personal estates and effects within this realm or abroad, which the defendant might purchase, or which might revert, descend, or be devised or bequeathed, or come to him before he should become entitled to his final discharge in pursuance of the said act, according to the adjudication made in that behalf, or in case the defendant should obtain his full discharge from custody without any such adjudication being made by the said court, then before the defendant should be so fully discharged from custody, and all debts due or growing due to the defendant, or to be due to him before such discharge as *aforesaid, should be [*668 vested in one Samuel Sturgis, then and still being the provisional assignee of the estates and effects of insolvent debtors in England, his successors and assigns, to have and to hold, receive, and take all and every the said estate and effects of the said defendant, real and personal, in possession, reversion, remainder, or expectancy, of any nature and kind whatsoever (except as aforesaid), and all and every the said estate and effects which should be so purchased by the defendant, or which should so revert, descend, be devised, bequeathed, or come to him as aforesaid, in possession, reversion, remainder, or expectancy, of every nature and kind whatsoever, with their and every of their rights, members, and appurtenances, unto the said Samuel Sturgis, his successors and assigns, according to the respective natures, properties, and tenures thereof; in trust, nevertheless, to and for the use, benefit, and advantage of the creditors of the defendant who should be entitled to share in a dividend of the said estate and effects under the provisions of the said act, and to and for such other uses, intents, and purposes, and in such manner and form, as are in and by the said act expressed of and concerning the same: that the said order was then duly entered of record in the said court, as by the said statute is directed, and notice of the said order was then duly published according to the directions of the said act, and which said order of the court still remains in full force: and that, by virtue of the said order of the said court so made as aforesaid, and by virtue of the said statute, the said debts and causes of set-off in the said ninth plea mentioned, became and were vested in the said Samuel Sturgis, as provisional assignee as aforesaid,—verification.

Special demurrer, assigning for causes,—that the replication does not state or show that the defendant, at the time of applying by petition, as in the replication *mentioned, was in actual custody [*669 within the walls of any prison in England, and does not show

that the said prison of our lady the Queen, in which the defendant was confined, was in England;—that it does not allege or show that the petition of the defendant therein mentioned contained the matters or statements required to be contained therein by the statute in the replication mentioned, in order to give the insolvent court jurisdiction, and to give validity to the said vesting order mentioned in the replication;—that the replication does not allege or show that the petition stated the time or place of the first arrest of the defendant in the cause or causes wherein he was then detained, or the time of his commitment to the said prison where he was then confined, nor the name or names of the person or persons at whose suit or prosecution the defendant was, at the time of presenting such petition, detained in custody, or the amount of the debt or debts, sum or sums, for which he was so detained, nor that such petition stated whether the defendant had given notice to the keeper of the gaol or prison in which he was confined, of his intention to present the said petition;—that the replication does not allege or show that the petition of the defendant was not dismissed by the court, or that the defendant was ever discharged by the said court, or obtained the benefit of the said act under the said petition;—that the replication does not show or allege that the petition was presented or subscribed after the time appointed for the commencement of the said act mentioned in the plea, and the dates mentioned in the replication, being laid under *videlicets*, are not material or traversable;—and that the replication does not show upon what kind or description of process the defendant was in custody at the suit of the said John Pook, as in the replication mentioned.

Joinder in demurrer.

*670] *J. Brown* (with whom was *Byles*, Serjt.), in support of the demurrer.—The replication is bad for not showing that the defendant, at the time of petitioning, was in custody within the walls of any prison in England: there are many Queen's prisons in Scotland and Ireland. [JERVIS, C. J.—We may take judicial notice of “the Queen's prison,” which is the prison of this court.] Then, the replication does not show that the petition therein mentioned contained the matters required by the statute. In this respect, it singularly deviates from the ordinary form of a plea of discharge under the act. The question turns upon the 35th section of the 1 & 2 Vict. c. 110, which enacts that it shall be lawful for any person who shall be in actual custody within the walls of any prison in England, upon any process whatsoever, &c., at any time within fourteen days next after the commencement of the actual custody of such prisoner, &c., or afterwards, if the said (insolvent) court shall in any case think reasonable to permit the same, to apply by petition to the said court for his discharge from such custody, according to the provisions of the act; and in such petition the prisoner is required to state the time and place of his first

arrest,—the name or names of the person or persons at whose suit he shall at the time of presenting such petition be detained in custody, and the amount of the debt, &c., for which he shall be so detained,—and whether he has given notice to the keeper of the gaol or prison in which he is confined, of his intention to present the petition,—and that he is willing and that his estate and effects shall be vested in the provisional assignee of the court,—and pray to be discharged from custody, and to have future liberty of his person against the demands for which he shall be then in custody, and against the demands of all other persons who shall be, or claim to be, his creditors at the time of presenting such petition. The replication here omits to *show four-fifths of the [*671 matters required by the statute to be stated in the petition, but merely confines itself to the last. [JERVIS, C. J.—Which is all that is relevant. Is it necessary to aver all the circumstances which give the insolvent court jurisdiction? or, is it not enough to state that they *had* jurisdiction?] The replication should have pursued the ordinary form,^(a) and stated that the defendant duly, and according to the directions and provisions of the statute, petitioned the court, and should have gone on to state what the petition contained, to show that the court had jurisdiction in the matter. In *Christie v. Unwin*, 11 Ad. & E. 373, 379 (E. C. L. R. vol. 39), COLERIDGE, J., says: “However high the authority may be, where a special statutory power is exercised, the person who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord Chancellor or by a justice of peace, the facts which gave the authority must be stated.” The rules of pleading are not less strictly construed than these orders. The doctrine thus laid down by COLERIDGE, J., is referred to and acknowledged by PARKE, B., in *Gossett v. Howard*, 10 Q. B. 411, 445 (E. C. L. R. vol. 59). In *Everard v. Paterson*, 6 Taunt. 625 (misprinted 645), (E. C. L. R. vol. 1), 2 Marsh. 304 (E. C. L. R. vol. 4); it was held, that, where a submission is, “so that the award be in writing under the hand of the arbitrator,” it must be shown in pleading that the award is under hand, as well as in writing. The rule laid down in the argument of *Peacock v. Bell*, 1 Saund. 74 (see 1 Wms. Saund. 74 *a*),—“The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so;” “nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged,”—is cited with approbation in the judgment of the Exchequer *Chamber, in *Gossett v. Howard*, 10 Q. B. 453 (E. C. L. R. vol. 59). [JERVIS, C. J.— [*672 That was the case of an exceptional and peculiar jurisdiction. This is the specific jurisdiction for which the court was created. WILLIAMS, J.—You contend that the statement of all these matters is a condition precedent to the prisoner’s being entitled to his discharge. Sup-

(a) See Chitty on Pleading, 7th edit. Vol III., p. 72.

pose there is a mistake in one of them, is the whole proceeding *coram non judice* ?] It is only upon the presentation of such a petition as the 35th section of the act requires, that the insolvent court acquires jurisdiction. [WILLIAMS, J., referred to the precedent in Pearson's Chitty, p. 394, of a replication to a plea of set off setting up the plaintiff's discharge; under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, from the debts sought to be set-off.] The replication is also defective in not showing upon what process the defendant was in custody: it might have been in respect of some matter over which the insolvent debtors court has no jurisdiction. [JERVIS, C. J.—Why are we to intend anything to oust the jurisdiction? It is these refinements of ingenuity that bring special pleading into disrepute.]

T. Jones, contra.—The replication is perfectly good. It states that the prisoner duly presented his petition according to the provisions and directions of the statute; it then states that the petition was duly filed and entered of record, and the petitioner's property vested in the provisional assignee. Surely it was enough to state that a petition presented to and filed in a court of competent jurisdiction, was entertained there, and an act of the court done upon it. *Tucker v. Webster*, 10 M. & W. 371,† and *Sayer v. Dufaur*, 5 D. & L. 313, are authorities to show that everything is alleged here with sufficient certainty. The case of *Nicol v. Orgill*, 12 Jurist, 34, however, is decisive. There, a plea *673] under the *37th section of the 1 & 2 Vict. c. 110, stated, that, after the accruing of the debts in the declaration mentioned, the plaintiff, being a prisoner upon process for debt, “did duly, and according to the directions and provisions of the statute,” apply, by petition, to the insolvent debtors court for his discharge; that such petition contained all such matters and things as are required by the act, and was filed in the court “pursuant to the directions in the said act;” that, after the filing of the petition, the court did order that all the real and personal estate and effects of the plaintiff, and all the future estate, &c., of the plaintiff, in or to any real or personal estate and effects, and all debts due or growing due to the plaintiff, or to be due to him before such discharge, should be vested in the provisional assignee: and it was held, on special demurrer,—first, that it was sufficiently averred that the plaintiff applied by petition within the time required by section 35,—secondly, that it was unnecessary to state the contents of the petition,—thirdly, that it was sufficiently averred that the petition was filed within the time required by section 35,—fourthly, that it was sufficient that the order showed that the debt for which the action was brought was vested in the provisional assignee. [JERVIS, C. J.—That case is very apposite. Mr. *Barstow*'s argument there is exactly that of Mr. *Brown* here.]

Brown, in reply.—The observations of PATTESON, J., in *Nicol v. Orgill* went merely to the time of filing the petition. [JERVIS, C. J.—

I think he meant his observation to apply to all the objections.] If the replication in this case had contained the same allegations as the plea in *Tucker v. Webster*, there would have been no objection to it. Nothing was said by the court there to excuse the pleader from stating that the petition contained all the matters required by the statute. As to *Sayer v. Dufaur*, *the question arose upon a statute, the words of which are essentially different from the words here.^(a) [*674

JERVIS, C. J.—I am of opinion that the replication is sufficient. The first and third objections were disposed of during the argument; the court thinking that they were bound to take notice that the Queen's prison, which is the prison of the court, is in England, and also thinking that the allegation as to the custody of the prisoner was sufficient. I apprehend the case of *Nicol v. Orgill*, so far as it goes, is a sufficient authority to dispose of the only remaining objection. The point was expressly taken, and the judgment of the court was in support of the plea, although, if Mr. *Brown's* argument could be sustained, it was quite as objectionable a plea as this. The pleader there took upon himself to allege that the petition contained all that was requisite to give the insolvent debtors court jurisdiction. The statement here is in substance the same. It is unnecessary to say whether a rejoinder that the petition did not contain all the requisites to give the court jurisdiction, would have been a good one.

WILLIAMS, J.—I am of the same opinion. Considering the nature of the averment here, I think it satisfies all the rules of pleading. That being so, it is unnecessary to say whether or not it is a condition precedent to found the jurisdiction, that the petition shall contain all the requisites pointed out by the 35th section of the 1 & 2 Vict. c. 110. It would obviously be very inconvenient so to hold; for, if it were so, the omission of any one particular would render the whole proceedings *coram non judice*,—an inconvenience so great that we should be slow to adopt a construction which would lead to it.

*TALFOURD, J.—I am of the same opinion. The allegation here is substantially the same as that which seems to have been held sufficient in *Nicol v. Orgill*. [*675
Judgment for the plaintiff.

(a) See *Rutter v. Chapman*, 8 M. & W. 24.†

DOE d. CORNWALL v. MATTHEWS. Nov. 7.

The defendant entered as tenant, under a written agreement, on the 7th of May, 1850, but paid no rent:—Held, that a six months' notice to quit, expiring on the 7th of May, 1851, was a good notice.

EJECTMENT by landlord against tenant. At the trial before JERVIS, C. J., at the sittings at Guildhall after the last term, it appeared that

the defendant entered upon the premises, under a written agreement, on the 7th of May, 1850, at a rent payable quarterly. No rent was ever paid; and, before the expiration of six months from the date of the agreement, the lessor of the plaintiff served the defendant with a notice to quit on the 7th of May, 1851, or at the expiration of the current year of his tenancy,—treating it as a tenancy commencing on the 7th of May, 1850.

On the part of the defendant, it was submitted that the notice was insufficient to found an ejectment commenced before Midsummer-day, 1851: but the lord chief justice overruled the objection, and a verdict was found for the lessor of the plaintiff.

Pearson now moved for a new trial, on the ground of misdirection. He submitted that the tenancy commenced on the 24th of June, 1850, relying upon the authority of *Doe d. Holcomb v. Johnson*, 6 Esp. N. P. C. 10 (confirmed by PARKE, B., in *Doe d. Savage v. Stapleton*, 3 C. & P. 275 (E. C. L. R. vol. 14)), where Lord *ELLENBOROUGH *676] said: “The notice to quit must correspond with the commencement of the term. But, if the tenant comes in in the middle of a quarter, and he afterwards pays his rent for that half-quarter, and continues then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter-day.”

JERVIS, C. J.—In the case you rely on, the tenant had paid for the broken quarter: and Lord ELLENBOROUGH goes on to say,—“In this case, had Cockett (the tenant under whom the defendant came in) paid his rent on the half-year commencing from the 21st of November, that would have been a tenancy from the 21st of November, and the notice to quit should have corresponded with it. But here the rent is paid half-yearly, from Christmas; that must be therefore held to be the commencement of the tenancy.” That makes all the difference. There is no ground for the rule.

The rest of the court concurring,

Rule refused.

*677] *WHEATCROFT v. MOUSLEY. Nov. 22.

It is no ground for changing the venue in an action for a libel contained in a letter written and sent to a person in the county to which the venue is sought to be changed, that the defendant (who has pleaded not guilty only) has many witnesses resident in that county, whom he intends to call in mitigation, and that the plaintiff has no witnesses in the county where the venue was originally laid.

THIS was an action for a libel contained in a letter written by the defendant to the plaintiff's attorney at Derby. Issue having been joined,

Phipson, for the defendant, moved for a rule calling upon the plaintiff to show cause why the venue should not be changed from Middlesex to Derbyshire,—upon an affidavit stating that all the defendant's witnesses resided in the county of Derby, and that the plaintiff had no witnesses in Middlesex. He submitted that this was not like the case of a libel in a newspaper, which is published wherever the newspaper is circulated. [JERVIS, C. J.—Have you pleaded a justification?] The only plea is not guilty. [MAULE, J.—What witnesses can you have?] Many in mitigation.

PER CURIAM.—That is no ground for changing the venue from the county in which the plaintiff has thought fit to lay it.

Rule refused.

*SMITH *v.* HARTLEY. Nov. 22.

[*678

The declaration contained three counts, to the first and third of which the defendant demurred, paying 25s. into court on the second, and pleading non assumpsit to the fourth. The plaintiff joined in demurrer, took out the 25s. in satisfaction as to the second count, and joined issue on the plea to the fourth count. At the trial there was a verdict for the defendant on the issue upon the fourth count, and a contingent assessment of damages for the plaintiff on the demurrers to the first and third counts; and the plaintiff afterwards obtained judgment on the demurrers:—Held, that the defendant, having succeeded upon the only issue of fact, was entitled to the costs of the trial,—deducting the costs which the plaintiff would have been entitled to upon a writ of inquiry as to the first and third counts.

THIS was an action of assumpsit. The declaration contained four counts,—the first, upon an award,—the second for work and labour and brokerage,—the third, for interest,—and the fourth, for money found due upon an account stated. The declaration was delivered on the 1st of November, 1849, and, on the 5th, the defendant delivered demurrers to the first and third counts, and pleaded non assumpsit to the second and fourth. After the issue was made up and delivered, and notice of trial and assessment of damages given, viz., on the 4th of February, 1850, the defendant obtained leave to withdraw his plea of non assumpsit so far as related to the second count, and in lieu thereof paid 25s. into court upon that count, which the plaintiff took out in satisfaction.

The issue in fact was tried, and the damages on the issues in law contingently assessed, at the sittings in London after Trinity Term, 1850, when a verdict was found for the defendant on the issue on the fourth count, and damages were assessed at 1s. on the first and third counts respectively, with leave to the plaintiff to move to increase the damages to 72*l.* on the first issue, and to 19*l.* 8*s.* 6*d.* on the third issue. In the following Michaelmas Term, a rule nisi for that purpose was obtained; which rule was made absolute in Hilary Term, 1851.

The demurrers were argued in Easter Term, 1851, and judgment given for the plaintiff.(a)

(a) 10 C. B. 800 (E. C. L. B. vol. 70).

*679] *Upon the taxation of costs, the master allowed the defendant the costs of the trial, he having succeeded upon the single issue of fact,—deducting from the amount what the plaintiff would have been entitled to if the damages on the first and third counts had been assessed on a writ of inquiry.

Humfrey now moved for a rule to show cause why the taxation should not be reviewed. He submitted, that, as the plaintiff was obliged to go down to try the issue in fact and to assess the damages on the issues in law, he was entitled to the costs of the trial.

JERVIS, C. J.—The third count being disposed of by the payment into court, and the only issue in fact having been found for the defendant, what costs could the plaintiff be entitled to? If the account stated had not been there, there would only have been a writ of inquiry: and the result of the trial places the plaintiff in the same position. The master has done quite right.

The rest of the court concurring,

Rule refused.

*680] *BLAKE v. COOPER. Nov. 24.

A judge at chambers having made an order directing an appearance to be entered for a lunatic defendant, upon an affidavit of service of the writ of summons by leaving a copy with the keeper of an asylum in which the lunatic was confined, without a previous writ of *distringas*,—the court set aside the order.

UNTHANK, on a former day in this term, moved for a rule nisi to set aside an order of MARTIN, B., directing an appearance to be entered for the defendant without a *distringas*, and without personal service, under the following circumstances:—The defendant was confined in a lunatic asylum at Lewisham, in Kent. The usual calls and appointments had been made, for the purpose of serving the defendant, at the asylum, but access to him was refused by the keeper, and upon the last attendance a copy of the writ of summons was left with the keeper. This, it was submitted, did not amount to personal service, so as to dispense with the ordinary proceeding by *distringas*: *Pigeon v. Bruce*, 8 Taunt. 410 (E. C. L. R. vol. 4). [JERVIS, C. J., referred to *Humphreys v. Griffiths*, 6 M. & W. 89,† and *Branson v. Moss*, 6 M. & W. 420,† 8 Dowl. P. C. 412, per nom. *Rawson v. Moss*, in both of which cases the proceeding had been by *distringas*.]

A rule nisi having been granted,

Collyer now showed cause.—The learned baron was of opinion that the circumstances amounted to personal service, and that it would be putting the plaintiff to unnecessary expense to require him to proceed by *distringas*. [JERVIS, C. J.—There is nothing like personal service here. I have always understood, that, to justify an appearance being

entered for a defendant, there must either have been personal service of the writ of summons, or the plaintiff must come for a *distringas*. There are many cases to show that the fact of the defendant being a lunatic does not dispense with a *distringas*.] It would be of no benefit to any one to serve the lunatic with a *distringas*. In the [*681 case of an ejectment, such a service as this would clearly be sufficient. [MAULE, J.—There, *personal* service is not absolutely necessary. JERVIS, C. J.—In *Banfield v. Darell*, 2 D. & L. 4, the Court of Queen's Bench granted a *distringas* to compel an appearance, where, on applications, on two occasions, at the residence of the defendant, who was a lunatic, the deponent had been informed that he could neither see the defendant nor the keeper,—the deponent having, on the last occasion, explained the purpose of his visit, and left a copy of the writ with the servant. Where the service of the *distringas* is upon the keeper of a lunatic asylum, all the forms of law are observed, and it is reasonable.(a) I find no exception in favour of lunatics in the act of parliament.(b)] It must be conceded that there is no express authority for dispensing with the *distringas*.

JERVIS, C. J.—The usual course must be followed in the case of proceedings against lunatics, as against other persons.

The rest of the court concurring,

Rule absolute.

(a) See Archb. Pr., 8th edit., by Chitty, 1109.

(b) 2 W. 4, c. 39, s. 3.

*SHEPPARD v. WILLIAMS. Nov. 24. [*682

The court granted a *distringas* to compel appearance, upon an affidavit showing the proper number of calls at the defendant's residence, the answers being that the defendant was ill and could not be seen,—without the usual statement of the deponent's belief that the defendant was keeping out of the way to avoid service.

A. J. JOHNSTON moved for a *distringas*, upon an affidavit stating three calls (the last two pursuant to appointment) at the residence of the defendant, for the purpose of serving him with the writ of summons, the answers upon those calls respectively being,—“that the defendant was dangerously ill, in the said dwelling-house, and could not be seen,” —“that the defendant could not be disturbed,”—and “that the defendant was worse.” He submitted that it was sufficiently apparent that the defendant could not, in the language of the statute,(a) “be compelled to appear, without some more efficacious process;” and referred to *Wilkins v. Jones*, 3 D. & L. 747, where COLERIDGE, J., held a similar affidavit to be sufficient, without the usual statement of a belief that the defendant was keeping out of the way to avoid service.

(a) 2 W. 4, c. 39, s. 3.

MAULE, J.—That allegation in the affidavit is dispensed with also in the case of a defendant who is confined in a lunatic asylum, and therefore incapable of personal service.(a) I think it sufficiently appears here that the plaintiff needs some more efficacious process to compel the defendant to appear.

The rest of the court concurring,

Rule granted.

(a) See *Blake v. Cooper*, ante, p. 680.

*683] *COLLINGRIDGE v. PAXTON. Nov. 24.

The effect of the statute 1 & 2 Vict. c. 110, s. 12, is, to place *bank-notes and money* seized under a *fi. fa.* upon the same footing as *goods*: and therefore, bank-notes so seized are not to be treated as the property of the execution-creditor, so as to be available in the sheriff's hands to satisfy a writ of *fi. fa.* lodged with him against such execution-creditor at the suit of a third person.

FINAL judgment in debt for money had and received by the defendant to the use of the plaintiff, having been signed for want of a plea on the 14th of June last, a writ of *fi. fa.* was issued on the 16th, directed to the sheriff of Oxfordshire, commanding him to levy of the goods and chattels of the defendant 312*l.* 15*s.*, and 1*l.* 2*s.* for writ, warrant, &c., and interest on 312*l.* 15*s.* at 4 per cent. per annum from the 14th of June, 1851, until payment, besides, &c. The writ was delivered to the sheriff for execution on the 16th of June; and, on the 18th, the sheriff, by virtue of that writ, seized certain bank-notes and money of the value of 313*l.* 17*s.*, the property of the defendant, which still remained in his custody.

Before the delivery of the above-mentioned writ to the sheriff, viz., on the 10th of March last, a *fi. fa.* against the now plaintiff, at the suit of Sir H. E. L. Dryden, endorsed to levy 644*l.* 16*s.* and interest thereon at 4*l.* per cent. per annum from the 8th March, 1851, till paid, besides, &c., was delivered to the same sheriff to be executed, and which last-mentioned writ remained unexecuted at the time of the levy of the bank-notes and money under the first-mentioned writ, and upon being ruled to return the first-mentioned writ, the sheriff returned "that immediately on the said seizure by him of the said bank-notes and coins respectively, he did under and by virtue of the said writ so issued at the suit of the said Sir H. E. L. Dryden, seize and retain in his hands, and specifically set apart and appropriate, the said bank-notes and coins respectively to be paid to the said Sir H. E. L. Dryden, under and according to the

*684] exigency of the said *last-mentioned writ, and in part discharge of the said sum so to be made thereunder as aforesaid, and did afterwards pay and deliver the same over, less 10*l.* 6*s.* sheriff's poundage thereon, to the said Sir H. E. L. Dryden, in such part discharge as aforesaid; and that therefore he had not the said money, with interest

as aforesaid, to render to the now plaintiff, for his debt, damages, and interest, as by the annexed writ he was commanded."

Hawkins, on a former day in this term, obtained a rule calling upon the sheriff of Oxfordshire to show cause why he should not pay over to the plaintiff's attorney the 313*l.* 17*s.* received by him under the *fi. fa.* at the plaintiff's suit, or the sum of 13*l.* 17*s.*, being the costs of the cause of *Collingridge v. Paxton*, and why he should not pay the costs of the application. He cited *Robinson v. Peace*, 7 Dowl. P. C. 93, *Masters v. Stanley*, 8 Dowl. P. C. 169, *France v. Campbell*, 9 Dowl. P. C. 914, and *Wood v. Wood*, 4 Q. B. 397 (E. C. L. R. vol. 45), 3 G. & D. 532. [WILLIAMS, J., observed that the matter was before him at chambers,^(a) and he was of opinion that the sheriff might have returned *nulla bona* to Sir H. Dryden's writ.]

Phipson now showed cause.—The question turns upon the 1 & 2 Vict. c. 110, s. 12, which enacts, that, "by virtue of any writ of *feri facias* to be issued out of any superior or inferior court after the 1st of October, 1838, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof, may and shall seize and take any money or bank-notes (whether of the governor and company of the Bank of England, or of any other bank or bankers), and any checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against *whose effects such writ of *fi. fa.* shall be sued out, and may and shall pay or deliver to the party suing out such execution any [*685 money or bank-notes which shall be so seized, or a sufficient part thereof, and may and shall hold any such checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by such writ of *feri facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised, and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and the payment to such sheriff or other officer by the party liable on any such check, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment or of such recovery and levy in execution, as the case may be, from his liability on any such check, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party

(a) Upon an interpleader summons, which was dismissed.

against whom such writ shall be so issued: provided, that no such sheriff or other officer shall be bound to sue any party liable upon any such check, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs *686] and expenses to be incurred in the prosecution of such action, *or to which he may become liable in consequence thereof; the expense of such bond to be deducted out of any money to be recovered in such action." [WILLIAMS, J.—What you have to make out, is, that these specific bank-notes which were handed over to Sir H. Dryden, were the property of Collingridge.] The sheriff, under the writ against Paxton, seized these specific notes. The moment he seized them, provided he specifically appropriated them, they became Collingridge's property. [MAULE, J.—It might be at the election of the execution-creditor to insist upon having the very notes delivered to him. But, if he did not so insist, would the property in them vest in him? Could Collingridge in this case have brought trover against the sheriff for these notes?] It is submitted that he might; though the property in them might still be in him, even though he could not maintain trover. [WILLIAMS, J.—Suppose the seizure consisted of one note only, the sheriff must change it, in order to deduct poundage.] The sheriff undoubtedly has a right to insist upon the execution-creditor's taking the very notes he has seized: if so, they are his property. *Wood v. Wood*, 4 Q. B. 397 (E. C. L. R. vol. 45), 3 Gale & D. 532, is an authority in favour of the sheriff: Lord DENMAN there says: "The statute, we think, applies only to the case of money set apart and ear-marked, and the property specifically of the party against whose effects the *fi. fa.* issues, and which the sheriff may seize as he would any other goods belonging to the defendant; and it was intended to remedy the defect which formerly existed in the execution of a *fi. fa.*, it being considered that nothing could be seized that could not be sold, and that money was not the subject of a sale." [MAULE, J.—In ordinary cases, where the sheriff seizes goods, and sells them, and has the money in his pocket, is he bound to *687] pay over that identical money to the execution-creditor?] *Certainly not. [MAULE, J.—Why, then, put money and notes in the anomalous position of being the *property* of the execution-creditor, instead of placing them in the same position as any of the other things which are mentioned in s. 12?] The very words of the act require them to be delivered over to the execution-creditor. The sheriff having specifically appropriated these notes, if they had been accidentally destroyed by fire, without any negligence on his part, the loss would have fallen upon the execution-creditor. The cases referred to on the motion are all distinguishable, on the ground that the money claimed was either a debt, or money in the hands of a third person in trust for the debtor, and not money in his hands.

Channell, Serjt., appeared for Sir H. Dryden, who had been served with the rule : but

Hawkins objected to his being heard, citing *Johnson v. Marriott*, 2 Dowl. P. C. 343, where it was held that one who is no party to a rule, is not entitled to be heard to show cause against it, merely because he has been served with or had notice of the rule. [MAULE, J.—So far as this rule is concerned, it is quite immaterial to Sir H. Dryden whether it is made absolute or discharged.]

Hawkins was not called upon to support his rule.

JERVIS, C. J.—I think this rule ought to be made absolute. The meaning of the 12th section of the 1 & 2 Vict. c. 110, appears to me to be this,—that it renders money and bank-notes, and other securities, liable to seizure under a *fi. fa.*, and to subject them when seized to all the rights and liabilities of goods of any other description. As money, the produce of goods seized, *remaining in the hands of the sheriff, does not become the property of the execution creditor, [*688 so neither does money seized by the sheriff. It is not ear-marked.

MAULE, J.—I am of the same opinion. The intention of the statute was to subject money, bank-notes, checks, &c., to seizure in the same way as any other chattels were before, except that, where money is seized, it is not necessary that the form of a sale should be gone through. But, although the sheriff may, and ought to, if the execution-creditor desires it, hand over the money to him, it does not follow that it becomes *by the seizure* the property of the execution-creditor. It is not convenient or necessary that the things for the first time made seizable by that act should be placed in a different position from goods which were seizable before. If it should be thought right that they should be liable to seizure under a *fi. fa.* against the plaintiff (being defendant in another suit), that may very aptly be the subject of future legislation. It can hardly be supposed that the legislature could have intended to leave property in the anomalous position which Mr. *Phipson's* argument assumes this property to be in, viz. that money and bills and other securities taken under a *fi. fa.* should be seizable in the hands of the sheriff, but that other property, and money, the proceeds of the sale of goods, should not. That would be very inconvenient; and it would in effect be saying that a right of action might be the subject of seizure under a *fi. fa.* I think it clearly is not within the scope of the words of the act.

WILLIAMS, J.—I am also of opinion that this rule must be made absolute. The only question is, whether money and bank-notes seized under a *fi. fa.*, and remaining in the hands of the sheriff, can be considered as *the property of the execution-creditor. It is plain [*689 that they could not be so but for the 12th section of the 1 & 2 Vict. c. 110; and the words of that section do not, in my judgment, alter the property. So far from its being necessary, in order to

give effect to the statute, to put upon it the construction contended for by Mr. *Phipson*, it seems to me that it would lead to great inconvenience.

TALFOURD, J., concurred.

Rule absolute.

HUTCHINSON v. THE SURREY CONSUMERS GAS-LIGHT AND COKE ASSOCIATION. Nov. 6.

A joint-stock company *completely* registered under the 7 & 8 Vict. c. 110, is not liable upon contracts entered into by the promoters *before* provisional registration.

Whether a completely registered company is liable in respect of contracts within the 23d section of the statute, entered into after *provisional*, and before *complete* registration,—*quære*.

DEBT. The declaration stated that the defendants, theretofore, to wit, on the 7th of April, 1851, were indebted to the plaintiff in 2000*l.* for the work and labour, care, diligence, and attendance of the plaintiff, then done, performed, and bestowed by the plaintiff in and about the formation of the Surrey Consumers Gas-Light and Coke Association, for the defendants, and at their request, and in and about procuring a site for the gas-works of the defendants, for the defendants, and at their request, and in and about the procuring permission and leave to lay down the mains and service-pipes of the defendants, to wit, in divers parishes and places within the county of Surrey, on the south side of the river Thames, for the defendants, and at their request, and in and about the preparing and making of divers plans, drawings, elevations, and sections of gas-works and buildings for the defendants, and at their request, and in and about the superintending the erection of *gas-works of the defendants, and certain buildings connected therewith, of the defendants, and of divers other works and buildings of the defendants, and in the laying down of divers mains and service-pipes of the defendants, for the defendants, and at their request, and in and about the preparing of divers plans and proposals for the manufacture of gas and coke, and for the supply thereof to the consumers and customers of the defendants, for the defendants, and at their request, and in and about the procuring divers contracts to be made, and divers persons to trade and contract, for the supply of coals, iron, and other articles for the use of the defendants, for the defendants, and at their request, and in and about the procuring divers persons to enter into the service of the defendants as their servants, for the defendants, and at their request, and for divers journeys and attendances before then made, performed, and given by the plaintiff in and about the business of the defendants, for them, and at their like request, and for divers reports and writings before then made and done in and about the business of the defendants, for them, and at their like request, and also for divers

materials, quantities of paper, pens, ink, and other necessary things before then found and provided and used and applied in and about the business of the defendants, for the defendants, and at their request: And in 2000*l.* for the price and value of work then done, and materials for the same provided, by the plaintiff for the defendants, and at their request: And in 2000*l.* for money then paid and advanced to and for the use of the defendants, and at their request: And in 2000*l.*, for the wages or salary of the plaintiff then due and payable from the defendants to the plaintiff, for the services of the plaintiff by him done and performed as the engineer of the defendants, and at their request, &c.

As to 50*l.*, parcel of the moneys in the declaration *mentioned, the defendant said that the plaintiff ought not further to maintain [*691 his action, because they brought into court 50*l.* and 1*s.* ready to be paid to the plaintiff; and they further said that they never were indebted to the plaintiff to a greater amount than 50*l.*, and that he had not sustained damages to a greater amount than 1*s.*, in respect of the causes of action in the introductory part of that plea mentioned,—verification, &c.; and, as to the residue of the causes of action in the declaration mentioned, the defendants pleaded that they never were indebted, &c.

There was also a plea, to the residue, of payment before action brought.

The plaintiff took out the 50*l.* and 1*s.*, in satisfaction *pro tanto*, joined issue on the second plea, and traversed the third.

The cause was tried before JERVIS, C. J., at the sittings in London after last Trinity Term. The plaintiff, who was a civil engineer, sought to recover from the defendants, the Surrey Consumers Gas-Light and Coke Association, 1550*l.*, being 300*l.* for expenses incurred in the formation of the company, and 1250*l.* for two and a half years' salary, at 500*l.* per annum, from the 29th of September, 1848, to the 25th of March, 1851, under the following circumstances:—

Early in 1848, the plaintiff projected the company in question; and, on the 27th of September, in that year, a meeting was held, at which it was proposed by the plaintiff, that the directors of the projected association should not be personally liable for the preliminary expenses. Another meeting took place on the 27th of October, 1848, at which it was, amongst other things, resolved, "that, for the purpose of having the works carried out in the most efficient possible manner, and in consideration of the ability shown by the plaintiff in his various gas undertakings, that the plaintiff be appointed *engineer to the association, and that the terms of his remuneration be considered at a [*692 future board."

Several other meetings were subsequently held, and the plaintiff's salary as engineer was ultimately settled at 500*l.* per annum: and

by the deed of settlement of the company it was provided that the engineer and manager should not be liable to be removed or dismissed from the offices to which they were respectively appointed, unless by the vote of not less than three-fourths of the directors for the time being, confirmed by an extraordinary general meeting specially convened for that purpose.

The company was provisionally registered, under the 7 & 8 Vict. c. 110, on the 9th of November, 1848, and completely registered on the 4th of May, 1849.

The plaintiff continued to act as engineer of the company till the beginning of the year 1850, when he was superseded, and one Angus Croll appointed engineer in his stead.

On the part of the defendants, it was submitted that they were not liable to the plaintiff in respect of services rendered by him before the company was completely registered: and the lord chief justice so ruled, upon the construction of the 23d section of the act,—leaving it to the jury to say whether the money paid into court was enough to satisfy the plaintiff's claim for services rendered by him subsequently to that period.

The jury found that it was, and a verdict was accordingly entered for the defendants.

Byles, Serjt., moved for a new trial, on the ground of misdirection, and also that the verdict was against the weight of evidence. He submitted that it was a misdirection to tell the jury that the company, when completely registered, was not liable for work done for them before registration. [MAULE, J.—A company completely *693] *registered cannot be liable for work and labour performed for a company which has no existence.] For some purposes, the company was an existing company from the time of provisional registration. [MAULE, J.—Not by the name by which the company is now sued, but as “The Surrey Consumers Gas-Light and Coke Association provisionally registered.”] The 23d section of the 7 & 8 Vict. c. 110, enacts, “that, on the provisional registration of any company being certified by the registrar of joint-stock companies, it shall be lawful for the promoters of any company so registered to act provisionally, &c.; and it shall be lawful for the promoters of such company to assume the name of the intended company, but coupled with the words ‘registered provisionally,’ and also to open lists, and also to allot shares and receive deposits thereon, &c., and also to perform such other acts only as are necessary for constituting the company, or for obtaining letters-patent, or a charter, or an act of parliament: but not to make calls, nor to purchase, contract for, or hold lands, nor to enter into any contracts for any services, or for the execution of any works, or for the supply of any stores, except such services and stores or other things as are necessarily required for the establishing of the company, and except

any purchase or other contract to be made conditional on the completion of the company, and to take effect after the certificate of complete registration, act of parliament, or charter, or letters-patent, shall have been obtained, and except in the case of companies for the executing such works as aforesaid, (a) contracts for services in making surveys and performing all other acts necessary for obtaining an act of incorporation or other act for enabling the company *to execute such works." [*694 The effect of that section, it is submitted, is, to make the company, upon its complete registration, liable upon all contracts which are within the powers conferred by the act. [MAULE, J.—Is then the contract contingent on the company's being afterwards completely registered?] The party with whom the contract was made would have no claim against the company unless it was completely registered. The company, after provisional registration, and before complete registration, are empowered to make contracts for such services as are necessarily required for the establishing of the company. Here, the work and labour in respect of which the plaintiff seeks to recover, was work and labour that was essential to the formation of the projected association; and the contract for it clearly was one which the act authorized the provisional committee to enter into. This construction of the 23d section of the statute is fortified by the 24th and 25th sections. Besides, there was evidence to show that the contract was adopted by the company after provisional registration. [JERVIS, C. J.—That point was not made at the trial; and, if it had been, I have no doubt the jury would have found that there was no new agreement.]

MAULE, J.—The lord chief justice seems to have ruled, upon the construction of the 23d section of the 7 & 8 Vict. c. 110, which enables the promoters of a company provisionally registered to make certain contracts, that it does not render valid, so as to charge the company after complete registration, contracts made by them before provisional registration. That direction I think was perfectly correct. The point now suggested, viz., that there was evidence of an adoption of the contract so as to make a new agreement, after provisional registration, was not presented to the jury. I think we ought not to grant a new trial, on the ground that some *view might have been suggested which would not have altered the case if it had been presented. I think [*695 there should be no rule.

WILLIAMS, J.—I am of the same opinion. When the language of the statute is carefully looked at, I think it is impossible that the company can be liable upon a contract entered into before provisional registration. Without, therefore, considering what would be the extent of their liability, if the contract were made after provisional and before complete

(a) i. e. "any bridge, road, cut, canal, reservoir, aqueduct, water-work, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock."

registration,—upon which I offer no opinion,—I think the direction of the lord chief justice was right.

The rest of the court concurring,

Rule refused.

CLACK v. SAINSBURY. Nov. 20.

The 7th section of the statute 3 & 4 W. 4, c. 98,—which exempted from the operation of the usury laws bills and notes made payable at or within *three months* after date, or not having more than *three months* to run,—is not repealed by the subsequent statutes 7 W. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 37, which extended the exemption to bills and notes made payable at or within *twelve months* after date, or not having more than twelve months to run, and to contracts for the loan or forbearance of money above 10*l.*,—with a proviso, that nothing in the last-mentioned act contained “shall extend to the loan or forbearance of any money upon the security of any lands, tenements, or hereditaments, or any estate or interest therein.”

Where, therefore, in an action upon a bill payable two months after date, the defendant pleaded that the bill was given in pursuance of a corrupt agreement for a loan of money upon usurious interest, and the plaintiff replied that the transaction took place after the passing and coming into operation of the 3 & 4 W. 4, c. 98, s. 7:—Held, that the replication was a good answer to the plea; and that the effect of the replication was not avoided by a rejoinder that the transaction took place after the passing and coming into operation of the statutes of Victoria.

THIS was an action of assumpsit on a bill of exchange for 40*l.*, drawn by the defendant on the 15th of November, 1850, upon, and accepted *696] by, one Charles Bromley, payable two months after date; with counts *for money lent, and money found due upon an account stated.

The defendant pleaded, that, theretofore, to wit, on the 13th of September, 1850, it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the said Charles Bromley and the plaintiff, that he, the plaintiff, should then, to wit, on the day and year last aforesaid, lend and advance to the said Charles Bromley a certain sum of money, to wit, the sum of 37*l.*, and that the plaintiff should forbear and give day of payment thereof to the said Charles Bromley from the day and year last aforesaid until and upon a certain day, to wit, the 15th of November, 1850, and that, for the loan of the said sum of 37*l.*, and for giving day of payment thereof as aforesaid, the said Charles Bromley should give and pay to the plaintiff, on the said 15th of November, 1850, more than lawful interest at and after the rate of 5*l.* per cent. per annum on the said sum of 37*l.*, that is to say, the sum of 3*l.*, making, together with the said sum of 37*l.* so to be lent and advanced as aforesaid, the sum of 40*l.*, and that, for securing such payment to the plaintiff of the said sum of 40*l.*, the said Charles Bromley should then, to wit, on the said 13th of September, 1850, deliver to the plaintiff a certain bill of exchange, bearing date the 12th of September, 1850, and to be drawn by the defendant upon, and accepted by, the said Charles Bromley, for the payment to the order of the defendant of 40*l.* two months after the date thereof, and endorsed by the defendant in blank: That the plaintiff, in pursuance of the said corrupt

and unlawful agreement, did then, to wit, on the 13th of September, 1850, lend and advance the said sum of 37*l.* to the said Charles Bromley, on the terms aforesaid, and the said Charles Bromley in pursuance of the said corrupt and unlawful agreement, and upon the terms thereof, and for the purpose in that behalf aforesaid, did thereupon then, to wit, *on the 13th of September, 1850; deliver to the plaintiff such [*697 bill of exchange as last aforesaid; and thereupon the plaintiff then took and received the said last-mentioned bill of exchange in pursuance of the said corrupt and unlawful agreement, and on the terms thereof, and for the purpose of securing the said repayment to the plaintiff of the said sum of 37*l.* so lent and advanced by him as aforesaid, and the said payment of the said sum of 3*l.* for such interest as aforesaid, which interest exceeds the rate of 5*l.* for the forbearing of 100*l.* for a year, contrary to the form of the statute in such case made and provided: That afterwards, and when the said last-mentioned bill of exchange was due and payable according to the tenor and effect thereof, to wit, on the 15th of November, 1850, it was agreed by and between and amongst the plaintiff and the defendant and the said Charles Bromley, that, in consideration of a certain sum of money, to wit, the sum of 3*l.*, to be paid by the said Charles Bromley to the plaintiff, further time should be given by the plaintiff for the payment to him of the said sum of 40*l.* in the last-mentioned bill of exchange specified, to wit, until the 18th of January, 1851, and that, for securing payment thereof as last aforesaid, the defendant should make his other bill of exchange in writing, directed to the said Charles Bromley, whereby the defendant should require the said Charles Bromley, to pay to his the defendant's order the said sum of 40*l.*, two months after date thereof, and that the said Charles Bromley should accept the said last-mentioned bill of exchange, and that the defendant should endorse and deliver the same to the plaintiff, and that the said last-mentioned bill should be taken and received by the plaintiff in renewal of and substitution for the said bill of exchange in that plea first mentioned: That afterwards, to wit, on the day and year last aforesaid, in pursuance of the said last-mentioned agreement, he the defendant did make, and *the said Charles Bromley did then accept, such bill [*698 of exchange as in that behalf aforesaid, and the defendant did then endorse and deliver the same to the plaintiff, who did thereupon then, and in pursuance of the said last-mentioned agreement, take and receive the same in renewal of and substitution for the said bill of exchange in that plea first mentioned, and for the purpose of securing repayment to him, as in that behalf aforesaid, of the said sum of 37*l.* so lent and advanced by him to the said Charles Bromley upon such corrupt and unlawful agreement as aforesaid, and the payment of the said first-mentioned sum of 3*l.* for such interest as aforesaid,—which said bill of exchange in that plea secondly mentioned was and is the

said bill of exchange in the said first count mentioned: That there never was any other consideration, except as in that plea aforesaid, for the said endorsement and delivery by the defendant to the plaintiff of the said last-mentioned bill of exchange, or for the plaintiff being the holder thereof; and that the plaintiff had always held and now holds the same for and upon such consideration as in that behalf aforesaid, and not for or upon any other consideration whatsoever,—verification.

To this plea the plaintiff replied, that each of the said contracts and bills of exchange in the said second plea mentioned, was made and entered into, and drawn, and accepted, and endorsed, respectively, and the said several matters and things therein mentioned occurred and took place, as in the said plea respectively alleged, after the coming into operation of a certain statute made and passed in a session of parliament held in the third and fourth years of William the Fourth, intituled “An act for giving to the corporation of the Governor and Company of the Bank of England certain privileges for a limited period,” and while the provisions of the same statute were and remained in force and unrepealed; and that the said contract or agreement for the said loan, and the said loan, in *the said second
*699] plea mentioned, were made upon security of the said bill of exchange in the said second plea mentioned, which was made payable within three months, that is, within two months from the date thereof, and not otherwise,—verification.

The defendant rejoined, that each of the said contracts and bills of exchange in the said second plea mentioned, was made and entered into, drawn, accepted, and endorsed, respectively, and the said several matters and things therein mentioned occurred and took place, as in the said second plea respectively alleged, after the passing and coming into operation of a certain statute made and passed in the first year of the reign of her present Majesty Queen Victoria, intituled “An act to except certain bills of exchange and promissory notes from the operation of the laws relating to usury,” and after various other acts, &c. (acts continuing that act), the last being the 8 & 9 Vict. c. 102, which still continued in force,—verification.

To this rejoinder, the plaintiff demurred specially.

Phinn (with whom was *Channell*, Serjt.), in support of the demurrer. —The plea is bad, as relying on a defence under a statute which is repealed: and, if the plea does afford a defence, it is answered by the replication, which is not met by the rejoinder. The statute 12 Ann. stat. 2, c. 16, s. 1, enacted “that all bonds, contracts, and assurances whatsoever, made after the 29th of September, 1714, for payment of any principal or money to be lent, or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred, shall be utterly void; and

that all and every person which shall, upon any contract to be made after the 29th of September, 1714, take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevisance, shift, or interest of any wares, merchandise, or other thing *whatsoever, [*700 or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money or other thing, above the sum of 5*l.* for the forbearing of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter term, shall forfeit and lose for every such offence the treble value of the moneys, &c., so lent, bargained, exchanged, or shifted." That statute, so far as regards bills and notes payable at or within *three months* after date, is unconditionally repealed by the 7th section of the Bank Charter Act, 3 & 4 W. 4, c. 98, which enacts, "that no bill of exchange or promissory note made payable at or within *three months* after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury, nor shall any person or persons drawing, accepting, endorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture." That provision was by the 7 W. 4 & 1 Vict. c. 80,—which continued in force until the 1st of January, 1840,—extended to bills or notes not having more than *twelve months* to run. Then came the statute 2 & 3 Vict. c. 37, the first section of which enacted "that no bill of exchange or promissory note made payable at or within *twelve months* after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money above the sum of 10*l.*, shall, by reason of any interest *taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or trans- [*701 ferring any such bill of exchange or promissory note, be void, nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, and endorsing, or signing any such bill or note, or lending or advancing or forbearing any money as aforesaid, or taking more than the present rate of legal interest for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture:

Provided always that nothing herein contained shall extend to the loan or forbearance of any money upon the security of any lands, tenements, or hereditaments, or any estate or interest therein." This last-mentioned statute was continued by the 8 & 9 Vict. c. 102, and 13 & 14 Vict. c. 56, respectively, to the 1st of January, 1856: the enactment therein contained is cumulative only, and does not affect, nor was it intended to have any operation at all upon, the absolute and unconditional repeal of the statute of Anne by the 3 & 4 W. 4, c. 98, s. 7, as to bills and notes not having more than *three months* to run. An affirmative enactment is never construed to repeal a prior enactment, unless there are clear and unequivocal words to manifest an intention that it should do so. In Dwarries on Statutes, p. 474, it is said: "An affirmative statute does not repeal a precedent affirmative statute; and, if the substance be such that both may stand together, they shall have a concurrent efficacy. The statute 23 Eliz. c. 1, which gave 20*l.* per month against a recusant, did not take away the penalty of 12*d.* for every Sunday given by stat, 1 Eliz. *c. 2."(a) Again, p. 533, it *702] is said: "A subsequent act too, which can be reconciled with a former act, shall not be a repeal of it, though there be negative words: as, the 1 & 2 Ph. & M. c. 10, that all trials for treason shall be according to the course of the common law, *and not otherwise*, does not take away 35 H. 8, c. 2, for trial of treason beyond sea."(a) [MAULE, J.—I think the two enactments may very well stand together.] All the cases upon the subject refer to instruments which are not within the 3 & 4 W. 4, c. 98, s. 7. In Derry v. Toll, 5 Exch. 741,† the transaction was only protected by the 2 & 3 Vict. c. 37: it was enough, therefore, for the defendant to bring the case within the statute of Anne, which as to the transaction in question was only qualifiedly repealed. POLLOCK, C. B., in delivering the judgment of the court there says: "The main point relied on by the plaintiff, was, that the plea was bad, for not having stated either that the contract was entered into previously to the 2 & 3 Vict. c. 37, or, if subsequently, that it related to land. But this objection cannot be sustained. The case is governed by Washbourn v. Burrows, 1 Exch. 107.† It was there decided that a party setting up usury as a defence need only state enough to bring the case within the operation of the statute of Anne; and that is certainly done here. That statute is still in force; and, if the opposite party means to contend that the case is one which is taken out of the operation of the statute of Anne by the statute of Victoria, the burthen is on him to do so. This is the clear result of our decision in Washbourn v. Burrows, which governs this case." [WILLIAMS, J.—The like had been previously held, upon a declaration, in Thibault v. Gibson, 12 M. & W. 88.† The very point now in

(a) Foster's case, 11 Co. Rep. 63. And see Vin. Abr. Statutes (E. 6).

*question was raised, but not decided, in *Follett v. Moore*, 4 Exch. 410,† where PARKE, B., in the course of the argument, [*703 says: "There was no clause in the 7 W. 4 & 1 Vict. c. 80, which rendered the loan illegal, if secured on land. That is pointed out in *Doe d. Haughton v. King*, 11 M. & W. 333."† And ROLFE, B., in giving judgment says: "Before the alteration in the law, the transaction would have been clearly usurious and void, within the statute of Anne. Now, it is not protected by the 3 & 4 W. 4, c. 98, s. 7, as the instrument is not a promissory note; and it is not protected by the 2 & 3 Vict. c. 37, because there is a security on land." In *Doe d. Haughton v. King*, a party having applied to the defendant for the loan of a sum of 6700*l*. for twelve months, on the security of a mortgage of freehold property, the defendant refused to advance the money unless the borrower would give him a promissory note for the amount, to be discounted by him at 5*l*. per cent. This the borrower agreed to do, and a bond and mortgage were given for 6700*l*., and the sum of 6365*l*., the amount of the note *minus* the discount and charge of preparing the securities, was paid to the borrower. An ejectment having been brought to recover possession of the premises, on the ground that the mortgage was invalid, as being given for an usurious consideration, the jury found that the primary object of the transaction was the discounting of the note, the mortgage being only a collateral security in the event of the note not being paid. And it was held, that the transaction was not usurious, and that the mortgage was valid independently of the 7 W. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 37. PARKE, B., there says: "I wish not to be understood as expressing any doubt that the transaction would have been valid, even if 10*l*. or 20*l*. per cent. had been agreed to be paid in this case, because the statute 7 W. 4 & 1 Vict. c. 80, was in force at the time of the *contract, and there is nothing in that statute rendering it less legal to protect such a payment by security on [*704 land than in any other way. Under the statute 2 & 3 Vict. c. 37, it is indeed different, because that statute contains an express proviso that nothing therein contained shall extend to the loan or forbearance of any money 'upon security of any lands, tenements, or hereditaments, or any right or interest therein.'" Even if this case is within the statute 2 & 3 Vict. c. 37, it was enough for the plaintiff to reply that the transaction was within the protection of the 3 & 4 W. 4, c. 98, s. 7: it was for the defendant to rejoin the exception in the 2 & 3 Vict. c. 37. [MAULE, J.—If the statute 3 & 4 W. 4, c. 98, s. 7, is gone by absorption into the 2 & 3 Vict. c. 37, where usury is imputed, the answer would be by confessing that the contract was usurious within the statute of Anne, and then showing everything necessary to take the case out of that statute, and to bring it within the statute of Victoria.] It is submitted that it is for the party who seeks to establish usury, to bring forward the proviso. *Berrington v. Collis*, 5 N. C. 332, 7 Scott, 302,

—where it was held that a loan upon usurious interest, secured by the deposit of a lease and a warrant of attorney, is not brought within the protection of the 7 W. 4 & 1 Vict. c. 80, by the addition of a promissory note as a further security,—will probably be relied on on the other side. But in all these cases, the question is, which is the principal, and which the collateral security; and that is a question for the jury.

Montagu Smith, contra.—Upon the fair construction of the several acts taken together, the 3 & 4 W. 4, c. 98, s. 7, is repealed, or, if not absolutely repealed, at all events suspended during the continuance of *705] the 2 & 3 *Vict. c. 37. The 7th section of the first-mentioned act is a mere exception of bills and notes of a certain description, viz., bills and notes having only *three* months to run, out of the operation of the statute of Anne. The extension of that exception to bills and notes not having more than *twelve* months to run, by the 7 W. 4 & 1 Vict. c. 80, by necessary implication repealed the former more limited provision, which is not referred to in any of the subsequent acts, the legislature treating the 7 W. 4 & 1 Vict. c. 80, as the only act containing any qualification of the statute of Anne which they had to deal with. The 2 & 3 Vict. c. 37 recites the 7 W. 4 & 1 Vict. c. 80, but does not in terms repeal it. [JERVIS, C. J.—It was only a *temporary* act. WILLIAMS, J.—It would be rather a strong thing to say that the 3 & 4 W. 4, c. 98, s. 7, would have been repealed, if the 7 W. 4 & 1 Vict. c. 80, had been allowed to expire.] It would be much more inconsistent to suppose that the legislature intended that the two provisions should exist together. [MAULE, J.—It may have been thought expedient to give a larger license to three months' bills than to bills of a longer date. The policy of the legislature would seem to have been, to encourage bills of a description more usually accredited in mercantile dealings: whereas, if the time were extended, the provision would embrace many that would not be mercantile bills. The legislature has not chosen to adopt the term "mercantile bills," but speaks of "three months' bills,"—probably foreseeing, that, if the former expression had been used, it might have given rise to a discussion in each case whether the bill was a mercantile bill or not.] Such bills would be equally protected by the 2 & 3 Vict. c. 37, unless falling within the proviso, as by the 3 & 4 W. 4, c. 98, s. 7. [MAULE, J.—Suppose the 3 & 4 W. 4, c. 98, s. 7, had expressly and in terms said that all usurious bills not having more than three months to run, whether there be landed security *706] or not, *shall be relieved from the disability imposed upon them by the statute of Anne, and a subsequent statute had passed providing that *all* bills should be in like manner protected, unless accompanied by the security of land,—might not both provisions co-exist?] That is not precisely this case. In Dwarries on Statutes, p. 534, it is said, that, "If a statute, before perpetual, be continued by an affirmative statute for a limited time, this does not amount to a repeal thereof

at the end of that time.(a) But *è contra*, where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect is expressed.”(b) *Berrington v. Collis*, 5 N. C. 332, 7 Scott, 302, shows that there may be a case where a bill at three months is not saved out of the statute of Anne. But, whether the 3 & 4 W. 4, c. 98, s. 7, be repealed or not, the plea in this case is a good answer to the declaration, and the replication is no answer to the plea. The plea shows a perfect defence under the statute of Anne. If there was nothing corrupt in the agreement which the defendant relies on for his defence, the plaintiff should have shown that by his replication. [WILLIAMS, J.—Suppose the plea had been before the 2 & 3 Vict. c. 37.] If any case can be supposed that will bring the bill within the statute of Anne, the plea is a good one. For this *Washbourn v. Burrows*, 1 Exch. 107,† is an authority. There, to covenant for payment of 250*l.* and interest on demand, the defendant pleaded that the covenant was entered into in pursuance of an usurious contract, by which the defendant agreed to pay more than 5 per cent. by way of interest, and that the payment was secured by a deed, whereby the defendant bargained and sold to the plaintiff, by way of security, certain personal *chattels, and also “*the crops of grass then growing on certain lands* :” the plaintiff replied, that the contract was entered into [*707 after the passing of the 2 & 3 Vict. c. 37 : and it was held, on general demurrer, that the plea was good, and the replication bad ; for, though the term “crops of growing grass” might mean crops to be severed by the owner of the soil, and delivered as a personal chattel, yet the plea afforded a good *prima facie* answer to the action, it being sufficient for the defendant to show that the contract was usurious within the statute 12 Ann. stat. 2, c. 16 ; and, if the plaintiff relied on the 2 & 3 Vict. c. 37, as excepting the case from the operation of that act, he should have replied that the covenant was entered into after the passing of the statute of Victoria, and that the security did not relate to land. ROLFE, B., in giving the judgment of the court, says : “Such a contract [a contract for usurious interest] would clearly be void under the statute of Anne, and, that statute being still in force, the plea is *prima facie* a good answer to the plaintiff’s demand, according to the principle laid down in *Thibault v. Gibson*. The question then arises, whether the plaintiff gets rid of the effect of the statute of Anne by merely stating that the contract was entered into after the passing of the statute of Victoria. We think he does not. The true effect of the statute of Victoria is, to except from the operation of the statute of Anne all contracts not relating to land ; and, when the defendant has by his

(a) Sir T. Raym. 397.

(b) *Warren v. Windle*, 3 East, 205.

plea clearly brought the case within the operation of the old statute, it is not sufficient for the plaintiff to reply that which may or may not bring the contract within the operation of the statute of Victoria. It was incumbent on him to aver all which is necessary to show that the statute of Anne does not apply to the question, namely, that it was entered into after the passing of the statute of Victoria, and that *708] it does not relate to land. The replication *does aver that the contract was after the statute of Victoria, but omits to aver that it does not relate to land. It therefore fails to show what the plaintiff was bound to make out, namely, that the statute of Anne does not apply." [JERVIS, C. J.—In that case, the replication was clearly bad. Here, the plea alleges a loan upon a corrupt agreement for more than lawful interest. The replication states that the contract was entered into after the coming into operation of the 3 & 4 W. 4, c. 98, and that the loan was made upon the security of a bill having less than three months to run. Is not that a good answer to the plea?] The plea being a good *prima facie* answer to the action, the replication, to be good, should have averred everything necessary to bring the case within the exceptions created by the subsequent statutes: *Derry v. Toll*, 5 Exch. 741.† The plaintiff should have shown what the transaction really was. [JERVIS, C. J.—This replication is certainly very like what the Court of Exchequer, in *Washbourn v. Burrows*, say it should have been.]

Phinn, in reply.—The whole point in the case is, whether or not the 3 & 4 W. 4, c. 98, s. 7, is repealed by the 2 & 3 Vict. c. 37. If it is not, the plaintiff is entitled to the judgment of the court. In *Washbourn v. Burrows* and *Derry v. Toll*, the instruments declared on were not within the 3 & 4 W. 4, c. 98, s. 7, but within the 2 & 3 Vict. c. 37: as to them, therefore, the statute of Anne was repealed *sub modo* only; whereas, with regard to three months' bills, the repeal is absolute and unconditional. [TALFOURD, J.—In effect, therefore, you say the plea is founded upon a non-existing statute.] Precisely so. It must be assumed that the agreement was as stated in the plea; and that, in the *709] existing state *of the law, discloses nothing usurious. The principle on which the cases of *Thibault v. Gibson*, (a) *Washbourn v. Burrows*, and *Derry v. Toll* were decided, are quite consistent with the present argument.

JERVIS, C. J.—I am of opinion that the plaintiff is entitled to the judgment of the court. The action is brought upon a bill of exchange payable at less than three months after date. The defendant has pleaded, in substance, that the bill was given in pursuance of a corrupt agreement for usurious interest upon a loan of money, contrary to the statute. To this the plaintiff has replied, that the transaction took place after the coming into operation of the 3 & 4 W. 4, c. 98, s. 7,

(a) And see *Turquand v. Mosedon*, 7 M. & W. 504.†

and whilst that provision was in force and unrepealed, and that the loan was made upon the security of a bill of exchange payable within three months from the date thereof. To this replication the defendant has rejoined, that the contract was entered into and the bill drawn after the passing and coming into operation of the statute 7 W. 4 & 1 Vict. c. 80, and other statutes continuing that act, which still remain in force. To this the plaintiff has demurred; and the question is, whether, upon the plea and replication taken together, a sufficient answer to the action appears upon the record. Upon some of the matters urged during the argument, it is unnecessary to give any opinion. The plaintiff contends that the effect of the 7th section of the 3 & 4 W. 4, c. 98, is, not merely to qualify, but absolutely to repeal the 12 Ann. stat. 2, c. 16, as to one class of contracts, viz. those upon bills or notes made payable at or within three months after date, or not having more than three months to run. It is, however, unnecessary to decide that, because we are all of opinion that the statute 3 & 4 W. 4, c. 98, is at all events a qualification of the statute of Anne, excepting bills of the de- [*710] scription now in question out of its operation, even though it does not *pro tanto* repeal it. Then comes the question whether the 7th section of the 3 & 4 W. 4, c. 98, is impliedly repealed by the 7 W. 4 & 1 Vict. c. 80, or the 2 & 3 Vict. c. 37, which extended the provision of the former statute to bills and notes not having more than *twelve months* to run, with a proviso (in the latter act) that “nothing therein contained should extend to the loan or forbearance of any money upon the security of any lands, tenements, or hereditaments, or any estate or interest therein.” I am of opinion that this statute of Victoria does not, as has been suggested, absorb or get rid of the statute of William, and that the two provisions are not inconsistent with each other. The legislature, at the time of passing the 3 & 4 W. 4, c. 98, seem to have thought that the circulation of mercantile instruments like bills of exchange and promissory notes not having more than three months to run, ought to be encouraged; and, having tried the experiment, by exempting them from the disabilities imposed by the statute of Anne, subsequently came to the conclusion that that exemption might safely and advantageously be extended to bills of a longer date, but with a qualification that the exemption should not apply to the case of loans upon the security of land. I think the two statutes may very well co-exist,—the statute 3 & 4 W. 4, c. 98, s. 7, applying to bills and notes not having more than three months to run, and the statutes of Victoria to bills and notes of a longer than three months’ date, and not having more than twelve months to run; and that the proviso in the 2 & 3 Vict. c. 37, is not applicable to bills such as that here declared on. The next question is, what is the effect of the pleadings in this case? If, as Mr. *Smith* says, the plea is merely a plea of a *corrupt agreement, and that the bill [*711] was given in pursuance of that corrupt agreement, the replication,

which merely states that the contract was entered into and the bill drawn after the passing and coming into operation of the 3 & 4 W. 4, c. 98, would have been a bad replication. But, upon consideration, I do not think that that is the fair meaning of the plea. The true meaning of it is, that there was an agreement for a loan of money at a higher rate of interest than 5*l.* per cent., to be secured by a bill at less than three months' date: and, if so, immediately it is shown that the bill was given after the 3 & 4 W. 4, c. 98, came into operation, the plea is answered, the case being taken out of the operation of the statute of Anne.

MAULE, J.—I also think the plaintiff in this case is entitled to judgment. I think, notwithstanding the subsequent acts, the statute 3 & 4 W. 4, c. 98, s. 7, is still in full operation. The object of that section was, to give facility to the circulation of bills of a mercantile character, though at a higher rate of interest than 5 per cent. It was intended to protect those transactions; but, for the reasons I before adverted to, it was thought not convenient to use the term “mercantile bills,” and therefore the expression adopted was bills “made payable at or within three months after the date thereof, or not having more than three months to run,” which would comprehend a large number of mercantile bills. The statute 2 & 3 Vict. c. 37, took a step in advance in relaxation of the usury laws,—to enable certain things to be done which before could not be done. It legalized contracts for the loan or forbearance of money above 10*l.*, where a greater amount of interest than 5*l.* per cent. was contracted for, except where the loan was made upon the security of land. Contracts like that now in question, already *712] protected by the 3 & 4 W. 4, c. 98, s. 7, are left as before: it was not intended to deprive them of any protection they already enjoyed; for, under the 3 & 4 Will. 4, c. 98, s. 7, they had a degree of protection which they could not get under the statute of Victoria. Both are affirmative, and both may I think well stand together. I at first thought the plea had merely stated that there was a corrupt agreement between the plaintiff and Bromley, and that the bill was given in pursuance of such corrupt agreement; and, if that had been so, Mr. *Smith's* argument would have been well founded. But that is not the meaning of the plea. The plea is that it was corruptly and against the form of the statute agreed between Bromley and the plaintiff, that the plaintiff should lend Bromley 37*l.* at usurious interest, and that a bill at two months should be given for the money,—stating that as the whole agreement. The court therefore sees in what the alleged corruption consists. The plea may, as far as the statement of the contract is concerned, leave it in doubt whether there was a corrupt agreement or not. If the transaction took place before the passing of the 3 & 4 W. 4, c. 98, the agreement would be corrupt. The replication, therefore, which shows that the transaction took place after the passing of

that statute, supplies the defect, and affords a good answer to the plea. The state of facts appearing upon the plea and the replication is this,—that the agreement mentioned in the plea was made after the passing of the 3 & 4 W. 4, c. 98, s. 7, excepting bills and notes not having more than three months to run from the operation of the statute of Anne; and, consequently, it has not that quality of corruption which is the foundation of the plea.

WILLIAMS, J.—I am of the same opinion. It is unnecessary to decide whether or not the plaintiff is right to the full extent of the argument urged on his behalf, *when he says that the statute of Anne is absolutely repealed as to bills and notes not having more than [*713 three months to run. It is enough to say that the statute 3 & 4 W. 4, c. 98, s. 7, is in full operation, notwithstanding the statute of 2 & 3 Vict. c. 37, and the subsequent statutes for its continuation. That being so, the plea, coupled with the fact introduced by the replication, that the transaction mentioned in the plea took place after the passing and coming into operation of the 3 & 4 W. 4, c. 98, shows that it was a perfectly legal and innoxious transaction, and not the subject of a plea in bar. And the rejoinder is ineffectual to invalidate the replication.

TALFOURD, J.—I am of the same opinion, fully adopting the reasons given by my Lord and my learned Brothers.

Judgment for the plaintiff.

COTTERELL v. JONES and ABLETT. Nov. 25.

Case will not lie against two persons for conspiring together, maliciously and vexatiously, and without reasonable or probable cause, to commence, and commencing, an action against the plaintiff, in the name of a third person, but for their own benefit,—without an allegation of legal damage resulting to the plaintiff therefrom.

Whether or not it will lie *with* such an allegation,—*quære*.

Where, therefore, a declaration alleged that A. and B. intending to extort money from C., maliciously and vexatiously, and without reasonable or probable cause, conspired together to commence, and did maliciously, &c., commence an unfounded action against C., in the name of D., but for their own benefit, knowing D. to be a pauper; and that, in further pursuance of the said conspiracy, &c., they maliciously, &c., prosecuted the action until afterwards, to wit, on, &c., when D. was nonsuited therein; and then proceeded to allege that afterwards it was considered by the Court that D. should take nothing by his writ, but that he and his pledges to prosecute should be in mercy, &c.,—“whereupon and whereby the said suit was and is wholly ended and determined;” and, that by means of the premises, C. had been put to costs, which, by reason of D.’s insolvency, he had been unable to obtain:—Held, that no cause of action was disclosed,—the declaration showing no award of costs of the nonsuit in the action against C.; and “extra costs,” *ex concessis*, forming no ground of legal damage.

THIS was an action upon the case. The declaration stated, that, before the committing of the grievances *thereinafter mentioned, [*714 to wit, on the 22d of October, 1844, a certain promissory note in writing, dated the 4th of October, 1844, and made by the plaintiff, for the payment to the order of William Merton, of the sum of 50*l.*, at

three months after date, and endorsed in blank to the said William Merton, had been delivered so endorsed by the said William Merton, to the defendant Jones, as security for the payment of a certain other promissory note in writing, dated the 17th of July, 1844, and made by one Robinson, for the payment to William Pratt, or his order, of 18*l.*, at three months after date, and endorsed by William Pratt, Charles Pratt, the plaintiff, and the said William Merton, and then held by the defendant Jones, and upon the terms that the said promissory note for 50*l.* should be returned by Jones to the plaintiff upon the promissory note for 18*l.* being fully paid and satisfied: that there never was any other value or consideration than as aforesaid for the making or payment of the said promissory note for 50*l.* by the plaintiff, or for the endorsement or payment of the same by the said William Merton, or for the defendant Jones holding the same: that, afterwards, and before the committing of the said grievances, to wit, on the day and year first aforesaid, the said William Pratt, Charles Pratt, William Merton, and the plaintiff, respectively, paid to Jones, and Jones then received from them respectively, 29*l.* 10*s.* in full satisfaction and discharge of the said promissory note for 18*l.*, and of all moneys, damages, and costs due thereon and in respect thereof; and that the said promissory note for 18*l.*, and the lien and claim of the defendant Jones on the said promissory note for 18*l.*, and the lien and claim of Jones on the said promissory note for 50*l.*, then became and were fully satisfied, and it then became and was the duty of Jones to deliver and return the said promissory note for 50*l.* to the plaintiff: Yet that the defendants, well knowing the premises, but contriving and intending *715] *to injure the plaintiff, and extort and obtain from him divers moneys, afterwards, to wit, on the 29th of January, 1850, falsely and maliciously, wrongfully, vexatiously, and deceitfully, and without any reasonable or probable cause, conspired together, falsely and maliciously, and without any reasonable or probable cause, to commence and prosecute an action in the Court of Common Pleas at Westminster, for a sum of money, to wit, 16*l.*, and interest thereon from the day the said promissory note became due, pretended to be due and owing from the now plaintiff on the same promissory note, against the now plaintiff, in the name of Lewis Henry Osborne, as the plaintiff in the said action, and the pretended holder and owner of the same promissory note, but for the sole benefit of themselves the defendants,—he the said Lewis Henry Osborne then being, as the defendants well knew, a person in poor and indigent circumstances, and wholly unable to pay the costs which the now plaintiff would necessarily incur in defending the said action: That, in furtherance of the said conspiracy, the defendants, contriving as aforesaid, afterwards, to wit, on, &c., falsely and maliciously, wrongfully, vexatiously, and deceitfully, and without any reasonable or probable cause, commenced an action in the said court on the

last-mentioned promissory note, against the now plaintiff, in the name of the said Lewis Henry Osborne, as the plaintiff, and as the holder and owner of the said promissory note, but for the benefit of themselves the defendants; and then falsely, maliciously, vexatiously, and deceitfully, and without any reasonable or probable cause, claimed in the said action the said sum of 16*l.*, and interest, as due from the now plaintiff to the said Lewis Henry Osborne on the said promissory note for 50*l.*, and then compelled the now plaintiff to, and the now plaintiff then did, appear to and plead to and defend the said action in the said court; and the defendants, in further pursuance of the said conspiracy, and further contriving as aforesaid, falsely, *maliciously, vexatiously, [*716 and deceitfully, and without any reasonable or probable cause, prosecuted the said action in the said court against the now plaintiff, until afterwards, to wit, on, &c., when the said Lewis Henry Osborne was nonsuited in the said action: That, afterwards, to wit, on, &c., it was considered in the said court, that the said Lewis Henry Osborne should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy, &c.,—as by the record and proceedings thereof still remaining in the said court, more fully and at large appeared; that thereupon and thereby the said suit became and was and is wholly ended and determined; and that, by means of the premises, the now plaintiff was put to and necessarily did incur great costs and expenses in and about defending the said action, amounting to a large sum, to wit, 50*l.*, which he had been and still was wholly unable to obtain from the said Lewis Henry Osborne, who, from the commencement of the said action hitherto, had been, and still was, wholly unable to pay the same or any part thereof; and that the plaintiff was also, by means of the premises, greatly inconvenienced, and put to great vexation, trouble, and anxiety in and about his defence to the said action, and was and is otherwise injured; to the plaintiff's damage of 100*l.*, &c.

At the trial before JERVIS, C. J., at the sittings at Westminster after the last term, a verdict was found for the plaintiff, damages 13*l.* 19*s.* 6*d.*, the amount of the costs incurred by the plaintiff in the action brought against him by Osborne, which sum, it was alleged, he had lost by the insolvency of Osborne.

Humfrey, on a former day in this term, obtained a rule nisi to arrest the judgment, on the ground that the declaration disclosed no cause of action.

Prendergast and *Prentice* now showed cause.—The declaration discloses a perfectly good cause of action: *the circumstances amount [*717 to an indictable conspiracy. The defendants, their claim against the plaintiff upon the bills having been fully satisfied, conspire with Osborne, a pauper, to sue the plaintiff in Osborne's name; and by this wrongful act of the defendants, in conjunction with Osborne, the plain-

tiff has sustained damage. [WILLIAMS, J.—The old writ of conspiracy only applied to treasons and felonies.] Gregory v. The Duke of Brunswick, 6 M. & G. 205 (E. C. L. R. vol. 46), 7 Scott, N. R. 972, shows that an action in the nature of conspiracy will lie where parties combine together to do an unlawful act to the plaintiff's prejudice. In Fitzherbert's Natura Brevium, page 98 N., it is said, that, "if a man procure another to sue an action against me to trouble me, I shall have a writ of deceit." So, in Savil v. Roberts, 1 Salk. 13, 1 Lord Raym. 374, Carth. 416, 5 Mod. 394, 405, 12 Mod. 208, Holt, 8, 150, 193 (E. C. L. R. vol. 3), it is laid down, that, "A civil action differs very far from an indictment; for, in that the defendant has his costs, and at common law the plaintiff was amerced *pro falso clamore*, for the estreats of which amercements warrants were constantly delivered to the coroners, who by a jury affected them according to the malice or vexation of the plaintiff. Also, in civil actions the plaintiff asserts a right, or complains of an injury, and therefore the court held, that to say A. is a *bastard*, and I am the heir, is not actionable; because he is a party concerned, and asserts a right. Aliter, if he had not added, and I am the heir. Vide 4 Co. So, to bring an action, though there be no good ground, is not actionable, because it is a claim of right, and he has found pledges, and is amerciable *pro falso clamore*, and is liable to costs: but yet, if one has a cause of action to a small sum, and take out a *latitat* to a very great sum, or has no cause of action at all, and yet maliciously sues the plaintiff, to the intent to imprison him for want of bail, *or do *718] him some special prejudice, an action of the case lies; but then it is not enough to declare generally, that he brought an action against him *ex malitia et sine causa, per quod* he put him to great charge, &c.; but he must show the grievance specially, as in 1 Sid. 424, s. c. whereas he owed the defendant 100*l.*, he sued him for 500*l.*, and, to hinder him from bail, affirmed to the sheriff 500*l.* was due, *per quod* he was imprisoned for want of bail; or, 1 Saund. 228, for that the defendant, intending to procure his imprisonment, where there was no cause of action, or without any cause of action, sued him in an action for 300*l.*, whereupon he was arrested and imprisoned, &c. And yet, if one that is not concerned, as a stranger, procure another to sue me causelessly, I may maintain an action against him generally.(a) If a man be falsely and maliciously indicted of any crime that may prejudice his fame and reputation, he may bring his action; for, he is falsely scandalized by the malice of the prosecutor, and this is a damage for which the law gives an action.(b) So, if a man be falsely and maliciously indicted of a crime that subjects him to peril of life or liberty, and for which he may be punished, he may bring his action; for, he is endangered in this respect, and receives a damage for which the law gives an action. So, if a man be falsely and maliciously

(a) Vide Fitz. N. B. 98 N., 2 Inst. 544, Cro. Car. 378.

(b) 1 Sid. 15, Yelv. 46, Lutw. 122.

indicted, though it neither touch his fame nor liberty; for, it is injurious to his property, *in putting him to a needless expense*; and a damage to one's property will maintain an action, as well as a damage to the fame or person."^(a) [JERVIS, C. J.—You will find that doctrine very much qualified, as you approach more modern times. TALFOURD, J.—Suppose two persons conspire to slander another, and *the words spoken turn out not to be slanderous,—could an indictment or an action be maintained?] They would be indictable [*719] for the conspiracy, though no action would lie by reason of the words not being slanderous. [JERVIS, C. J.—That would be indicting the parties for an intention.] No action lies for seduction, unaccompanied by loss of services; ^(b) but, if the seduction were the result of a conspiracy, no doubt an action *would* lie. Actions for malicious prosecution of criminal charges are of frequent occurrence. Upon what principle is it that that sort of action is maintainable? Because the process of the Queen's courts is made use of for the purpose of oppression. What difference is there, in this respect, between process of a criminal and process of a civil court? [JERVIS, C. J.—Where an *action* is wrongfully brought, the costs which the party gets are a compensation for the wrong: but, in criminal cases, there are no costs.] In Fitzherbert's *Natura Brevium*, page 116 B., it is said, that, "if men say and affirm unto A. that he hath right unto such land, and procure and cause him to sue an action for the same against B., who is tenant of that land, &c., by which he is of necessity compelled to sell other lands or tenements for the defence of his land, &c., now he shall have an action against those who procure or conspire to cause A. to bring his action, &c." [WILLIAMS, J.—That may be, though it is not so put, on the ground that no costs were recoverable in a real action.] In *Atwood v. Monger*, Style, 378, ROLLE, C. J., says: "An action upon the case lies for bringing an appeal against one in the Common Pleas, though it be *coram non judice*, by reason of the vexation of the party; and so it is all one whether there were any jurisdiction or no, for, the plaintiff is prejudiced by the vexation; and the conservators took upon them to have authority to take the *presentment. And I hold that an action [*720] upon the case will lie for maliciously bringing an action against one, where he had no probable cause; and, if such actions were used to be brought, it would deter men from such malicious courses as are too often put in practice." In *Waterer v. Freeman*, Hobart, 266, it is said: "If a man sue me in a proper court, yet, if his suit be utterly without ground of truth, and that certainly known to himself, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill practice, though the suit itself

(a) P. 3 E. 3, fo. 19, pl. 34, 3 Ass. fo. 1, M. 7 H. 4, fo. 31, pl. 15, T. 11 H. 7, fo. 25, pl. 7, F. N. B. 106, Style, 379, *Smith v. Hickson*, 2 Stra. 977.

(b) See *Grinnell v. Wells*, 7 M. & G. 1033 (E. C. L. R. vol. 49), 8 Scott, N. R. 741.

be legal, and I cannot complain of it, as it is a suit; as in the case before: and therefore the 16 of E. 3, Fitz. *Deceit*, 35, a conusee of a statute sued execution, against his deed of defeasance; whereupon the conusor had an action of deceit against him and his assign, in the nature of an *audita querela*. So, note the distinction upon this case, and 43 E. 3, before. If a man sue me, and, hanging that suit, commence another against me, to this I have a plea in abatement; which proves this latter suit unjust and vexatious. But, if he discontinue the former, he may bring a new action. Likewise, I hold that I may have an action upon the case against him that sues me against his release, or *after the money duly paid*; yea, though it be upon a single obligation." That is almost identical with the case now before the court. In Hawkins's Pleas of the Crown, (a) it is said: "Since it is certain that an action on the case in the nature of a writ of conspiracy doth lie for a false and malicious prosecution for any crime, whether capital or not capital, though it do not proceed to an actual indictment, or appeal, and that the same damages may be recovered in such an action as in a writ of conspiracy, it hath been thought needless to inquire whether such writ may be maintained for such a prosecution or not." Mr. Hargrave, in his note to Co. Litt. *721] *161 a, says: "Where two or more conspire to harass any person by a false and malicious suit, whether criminally or civilly, it is a crime punishable by indictment, or the parties injured may sue for damages by writ of conspiracy; and both of these remedies lie at common law, that part of the statute or ordinance of *Articuli super chartas* which gives remedy against conspirators by writ out of Chancery, being, according to both Staunford and Lord Coke, only an affirmance of the common law. (b) There is also a remedy for a false and malicious prosecution, though the aggravation of a conspiracy or confederacy is wanting, and the injury comes from one only; for, in such a case, the party prosecuted may have an action upon the case for damages. I apprehend, too, that such action lies, as well where the vexation is practised by a *civil* suit, as where it is carried on through the medium of a criminal process. F. N. B. 114 D. See, however, Bridgm. MS. Rep. 97. Indeed, the numerous cases to be met with in the books are chiefly for criminal prosecutions. See 1 Vin. Abr. 17 to 35, and the case of *Farmer v. Darling*, 4 Burr. 1971. But there seems to be no reason for distinguishing between the writ of conspiracy and an action upon the case, in this respect; and, exclusively of other authorities which may probably be found upon a search, Lord Hobart, Mr. Serjt. Rolle, and Lord Holt, all concur in the idea, that, where a *civil* suit is commenced falsely and maliciously, and for the mere purpose of vexation, it is actionable. See Hobart's argument in *Waterer v. Freeman*, Hobart, 205, 266, Rolle's words in *Atwood v. Monger*, Style, 379, and Holt's

(a) Book 1, Ch. 27, § 5, p. 445.

(b) Staunf. C. P. 172, 2 Inst. 561, 562.

argument in giving judgment in *Savil v. Roberts*, reported in 12 Mod. 288, 1 Ld. Raym. 374, and other books, and the case of an action for falsely *and maliciously suing out a commission of bankruptcy, [*722 in W. Blac. 427.](a) [WILLIAMS, J.—That is not quite accurate.] There are many authorities which support it in substance. In Rolle's Abridgment, *Action sur Case* (H), pl. 1, it is said: "Si home sue un action de dett vers moy en le nosme de J. S., sans le volunt de J. S., jeo avera bon action sur le case vers luy pur cest vexacion, 7 H. 6, 43; admitt per issue; et issint est tenus, Fitzherbert, *Action sur le Case*, 3." In *Pechell v. Watson*, 8 M. & W. 691,†(b) a declaration in case stated, that, before and at the committing of the grievances by the defendants, an action of trespass had been commenced, and was depending, wherein R. H. was plaintiff, and the now plaintiffs were defendants; in which action the now plaintiffs appeared by P. M., then being their attorney in that behalf, and the said action was defended by the now plaintiffs by and through the said P. M. as such attorney; and charged that the defendants, contriving, &c., wrongfully, unjustly, maliciously, and unlawfully upheld and maintained the said action, on the part of the said R. H., against the now plaintiffs; by reason whereof the now plaintiffs had been greatly injured, prejudiced, and aggrieved in and about their defence in the said action, and had incurred and been obliged to pay divers large sums of money, amounting, &c., in and about their defence of the said action, so by them made through the said P. M., so being their attorney in that behalf. At the trial, the jury found a verdict for the plaintiffs for the amount only of the bill of costs paid by them to P. M. as their attorney in the former action, and the verdict was entered upon the *postea* accordingly. And the action was held, on motion in arrest of judgment, to be maintainable. The declaration here is like the first count in that case, save in an averment that is immaterial. [JERVIS, C. J.—That was a *case of maintenance: the defendants had no interest in the suit; [*723 here, however, they had.] They can hardly be said to have had an interest in the fraud. Their attempt to extort money unjustly was an aggravation. In *Flight v. Leman*, 4 Q. B. 883 (E. C. L. R. vol. 45), 1 Dav. & Mer. 67, the plaintiff failed for want of an averment of the absence of reasonable and probable cause. [WILLIAMS, J.—I doubt whether we can take notice of the alleged insolvency of the nominal plaintiff in the former action: the costs must be assumed to be a full compensation for the vexation.] Suppose an action brought in the name of a non-existing plaintiff,—would not the party bringing it be liable? *Fivaz v. Nicholls*, 2 C. B. 501 (E. C. L. R. vol. 52),—notwithstanding the observation of MAULE, J., who says, "I am by no means disposed to hold that an action can be sustained for inciting another to

(a) *Brown v. Chapman*.

(b) See *Hearsey v. Pechell*, 5 N. C. 466, 7 Scott, 477, 7 Dowl. P. C. 437.

bring an action without reasonable or probable cause. The cases seem to me to show the contrary,"—is rather an authority in support of this action. [MAULE, J.—The cases you have cited rather seem to show that the remark you except to is well founded.] This is not an action for inciting another to bring an action; but for bringing it in his name, he being a pauper, and so putting the plaintiff to costs. [MAULE, J.—Is there an instance of an action against two or more for a conspiracy to do, and doing, a thing which would not be actionable if done by one?] Gregory v. The Duke of Brunswick, 6 M. & G. 205 (E. C. L. R. vol. 46), 7 Scott, N. R. 972, is very like that case: each of the defendants there would have a perfect right to hiss the plaintiff's performance; but the conspiracy for that purpose was a cause of action.(a) [WILLIAMS, J.—In the case of Savil v. Roberts, it was not the conspiring, but the damage *724] to the plaintiff, which was said *to be the cause of action. MAULE, J.—Would an action lie against two or more for conspiring or agreeing not to bid at an auction?] It is submitted that it would. [MAULE, J.—It is often done, but I never heard of an action being brought for it.] The damage resulting from it would undoubtedly be a ground of action.(b) In Vertue v. Lord Clive, 4 Burr. 2472, it seems to have been considered that a conspiracy or combination amongst officers in the East India Company's service, to resign their commissions, was an indictable offence. In Com. Dig. *Action upon the Case for Conspiracy*, (A), it is laid down, upon the authority of Fitzherbert's *Natura Brevium*, p. 116 E., that an action upon the case in the nature of conspiracy lies "for procuring an action to be brought against another maliciously." So, in Com. Dig. *Action upon the Case for a Deceit*, (A 4) it is said, that, "if a man procure another to commence an action in any court against A., to vex him," case will lie; for which Comyns cites Fitzherbert's *Natura Brevium*, 98 N, 2 Inst. 444, and Savil v. Roberts. [WILLIAMS, J.—In Chamberlen v. Prescott, 2 Sid. 162, NEWDIGATE, C. J., says: "Jeo ne soy satisfie ove le livre F. N. B. 116 A. F." MAULE, J.—All the cases put in Fitzherbert mention particular damage. The simple fact of bringing an unfounded action cannot be the ground of another action. The true question is, whether the fact of the nominal plaintiff's being a pauper, is such a particular injury as to entitle the now plaintiff to maintain this action.] "If," as COLERIDGE, *725] J., observes *in Heywood v. Collinge, 9 Ad. & E. 268, 274 (E. C. L. R. vol. 36), 1 P. & D. 202, "an action is not sustainable under such circumstances, we must be prepared to hold that the process of the court may be abused by a plaintiff for purposes however wanton

(a) Held by Lord MANSFIELD to be indictable: Anonymous, 18 or 19 G. 3,—cited 2 Russell on Crimes, 3d edit. p. 677.

(b) In Levi v. Levi, 6 C. & P. 239 (E. C. L. R. vol. 25), it was ruled by GURNEY, B., that if brokers agree together before a sale by auction, that only one of them shall bid for each article sold, and that all articles thus bought by any of them shall be sold again among themselves at a fair price, and the difference between the auction price and the ultimate price divided among them, this is a conspiracy for which they are indictable. The experiment, however, has not been tried.

and malicious." And see *Grainger v. Hill*, 4 N. C. 212, 5 Scott, 561, and *De Medina v. Grove*, 10 Q. B. 152 (E. C. L. R. vol. 59). This action is clearly maintainable, upon the same ground as that upon which an action for maliciously suing out a commission of bankruptcy or lunacy is maintainable.

Humfrey, Miller, Serjt., and Pearson, in support of the rule.—The question is, whether it is *actionable*, under the circumstances stated in this declaration, to put forward as plaintiff one who is unable to pay costs,—whether the cause of action be a good or a bad one. For anything that appears, Osborne might have been the *bond fide* holder of the bill at the time the action was brought. Suppose, knowing the bill to have been paid, he brought the action, and was unable to pay costs,—would an action lie against him for that? And, what difference can it make, that a third person brings the action in his name? [MAULE, J.—To hold it to be actionable to sue in the party's own name, would be rather too great an interference with the right to bring actions: but the other position is consistent with saying that *that* action will not lie. WILLIAMS, J.—We must assume the strongest state of facts that the language of the declaration will bear: it is alleged to have been done *maliciously*.] That must be understood to mean malice in its ordinary and strict legal sense. [WILLIAMS, J.—The declaration must be understood in any sense which will support it, provided it be susceptible of *that* sense.] For anything that appears, the action upon the 50*l.* bill may still be undecided. [MAULE, J.—The declaration alleges that the defendants **“prosecuted the said action in the said court against* [*726 *the now plaintiff, until afterwards, to wit, on, &c., when the said* L. H. Osborne was nonsuited in the said action; and that afterwards, to wit, on, &c., it was considered in and by the said court that the said L. H. Osborne should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy, &c., as by the record and proceedings thereof, still remaining in the said court, more fully and at large appear; *whereupon and whereby the said suit became and was and is wholly ended and determined*; by means of which premises the now plaintiff was put to, and necessarily did incur, great costs and expenses in and about defending the said action, amounting to a large sum, to wit, 50*l.*, which he has been and still is wholly unable to obtain from the said L. H. Osborne.” Costs are only adjudged to a man with his assent,(a) and here the plaintiff does not seem to have assented to an award of costs in the former action. He has lost the costs by not asking for them. *Prendergast*.—The allegation is, that, *by means of the premises*, he lost the costs. JERVIS, C. J.—There is no judgment for costs. *Prendergast*.—It is a mere imperfection in the statement of the proceedings, which is cured by verdict. JERVIS, C. J.—An imperfection may be cured, but not a total omission.] A man may bring an action, even maliciously.

(a) See the form in Tidd's Forms, 8th edit. 342, § 27, Chitty's Forms, 6th edit. 91.

against another, provided the same action affords the other side the means of obtaining such redress for the wrong as the law allows, viz., costs. It is not alleged here that Osborne sued *in formâ pauperis*, and therefore there might have been a judgment for costs. Osborne's insolvency was immaterial, as there was no judgment against him for costs. As, therefore, it is conceded that no action could have been maintained, if Osborne had been solvent, and *the plaintiff is in no degree dam-
 *727] nified by his insolvency, this action clearly cannot be maintained. In Com. Dig. *Action upon the Case for a Deceit* (E 1), it is said that "deceit does not lie against him who sues in a proper court, without cause; as, if one sue in the spiritual court for tithes, after payment,"—citing *Bray v. Patrid*, Cro. Eliz. 836. In *Purton v. Honnor*, 1 B. & P. 205, this court, upon the authority of *Savil v. Roberts*, decided that case does not lie to recover damages against the lessor of the plaintiff in a vexatious ejectment. TINDAL, C. J., in *O'Connell v The Queen*, 11 Clark & Fin. 233, thus defines conspiracy,—“The crime of conspiracy is complete, if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent, or even lawful.” That which is charged here clearly does not come within that definition of the offence.

JERVIS, C. J.—In the view which I take of this case, it is unnecessary to consider the principal point which has been discussed at the bar,—because, whether an action will lie or not for doing what this declaration charges, viz. falsely and maliciously, wrongfully, vexatiously, and deceitfully, and without any reasonable or probable cause, conspiring together, falsely and maliciously, and without any reasonable or probable cause, to commence and prosecute an action in the name of a third person, but for the defendant's own benefit, whereby the plaintiff has sustained damage, it is admitted that no such action will lie, unless the plaintiff has actually sustained damage. It is conceded also, that, if the party so wrongfully put forward as plaintiff in the former action had been a person in solvent circumstances, this action could not have been maintained, inasmuch as the award of costs to
 *728] *the defendant (the now plaintiff) upon the failure of that action, would, in contemplation of law, have been a full compensation to him for the unjust vexation, and consequently he would have sustained no damage. We must, therefore, look at the record, and see what the allegation of injury is. Now, this not being an action for an abuse of the process of the court, but an action such as I have already described, it was necessary to show that the former action was determined and at an end. How is that stated upon this record? The declaration, after stating the bringing of the action, and that the now plaintiff appeared and pleaded thereto, alleges that the defendants, in further pursuance of the said conspiracy, and further contriving as aforesaid, falsely, maliciously, wrongfully, vexatiously, and deceitfully,

and without any reasonable or probable cause, prosecuted the said action in the said court against the now plaintiff, until afterwards, to wit, on, &c., when the said L. H. Osborne (the plaintiff in that action) was nonsuited in that action; and that afterwards, to wit, on, &c., it was considered in and by the said court, that the said L. H. Osborne should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy, &c., as by the record and proceedings thereof, still remaining in the said court, more fully and at large appeared; and that thereupon and thereby the said suit became and was and is wholly ended and determined: and it then goes on to allege, that, "by means of the premises," the now plaintiff was put to and necessarily incurred certain costs. The court is bound to take notice, that, upon a judgment of nonsuit, the defendant is by law entitled to an award of costs if he asks for them. Unless costs are awarded, how is the court to say that the inability of the now plaintiff to obtain them from Osborne arose from any other cause than because he got no judgment for costs? For anything that appears, the plaintiff has *sustained the injury of which he complains, solely by his own neglect [*729 to apply for costs as against Osborne. Upon this ground, therefore, without offering any opinion upon the principal point argued, I think the rule to arrest the judgment must be made absolute.

MAULE, J.—I agree with my Lord Chief Justice in thinking that this rule ought to be made absolute. The declaration is defective, for not showing that any damage has accrued to the plaintiff from the act of the defendants. It is conceded that this action could not be maintained in respect of extra costs, that is, costs *ultra* the costs given by the statute(a) to a successful defendant. That being so, what is the damage which the plaintiff is alleged to have sustained here? The declaration, after alleging that Osborne was nonsuited in the former action, proceeds to state that it was considered by the court that Osborne should take nothing by his writ, but that he and his pledges to prosecute should be in mercy; and that "thereupon and thereby, the said suit became and was and is wholly ended and determined." That is a perfectly correct mode of showing a judgment of nonsuit without costs. In order to make the non-payment of costs a legitimate subject of damage, it should at least be shown that they are such costs as properly followed the judgment. Here, the plaintiff has got all he chose to ask for, that is, a judgment, without costs,—the record showing nothing more than that the action was brought to a proper termination. In an action for a malicious prosecution, or for a conspiracy to bring an action or to institute a prosecution, it is necessary to show that the action or the prosecution was determined. In the case of an action being improperly brought, it is competent to the court in which it is *brought, [*730 upon the application of the defendant, to award costs, if costs

(a) 23 H. 8, c. 15, s. 1.

have been incurred. There being no award of costs here, we can only assume, either that costs were not asked for, or that none were incurred. The declaration, therefore, showing that the action commenced by Osborne was brought to a proper termination, without any injury or damage to the now plaintiff, fails to show a cause of action against the now defendants. Consequently, the judgment must be arrested.

WILLIAMS, J.—I am of the same opinion. It is clear that no action will lie for improperly putting the process of the law in motion in the name of a third person, unless it is alleged and proved to have been done maliciously and without reasonable or probable cause: but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also a legal damage. The question in this case, therefore, resolves itself into this,—Whether this declaration alleges any legal damage as resulting from the conduct imputed to the defendants. It is unnecessary to say whether, if this declaration had averred a recovery of costs against Osborne in the former action, and that such recovery had become fruitless by reason of Osborne's insolvency, that would have been a sufficient statement of a legal damage; because I agree with my Lord and my Brother MAULE that there is no sufficient averment that the now plaintiff ever gained a legal right to costs against Osborne, by the judgment in that action, and consequently there is nothing to show that the loss of costs was the result of Osborne's insolvency. The ground of this action therefore fails.

TALFOURD, J.—I am of the same opinion. It appears from the whole current of authorities, that an action of this description, if maintainable at all, is only *maintainable in respect of legal damage *731] actually sustained; and that the mere expenditure of money by the plaintiff in the defence of the action brought against him does not constitute such legal damage; but that the only measure of damage is, the costs ascertained by the usual course of law. There being no averment in this declaration that any such costs were incurred or awarded, no legal ground is disclosed for the maintenance of the action.

Rule absolute.

Bicknell v. Dorion, 16 Pick. 478; Potts v. conspiracy is the gist of the action: Tappan v. lmlay, 1 Southard, 330; Whipple v. Fuller, 11 Powers, 2 Hall, 277. See Jones v. Baker, 7 Conn. 582; Pangburn v. Bull, 1 Wend. 345; Cowen, 445; Gardner v. Preston, 2 Day 209; Kason v. Petway, 1 Dev. & Bat. 44. In the Sheple v. Page, 12 Vermont, 519; Hutchins v. Hutchins, 7 Hill, 104.

END OF MICHAELMAS TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Michaelmas Vacation,

IN THE
FIFTEENTH YEAR OF THE REIGN OF VICTORIA. 1851.

SARGENT, Appellant, WEDLAKE and Others, Respondents.
Dec. 1.

This court will not take notice of any informality in the plaint in the county court; that being matter of practice to be dealt with by the judge at the hearing.

On the morning of the trial of a plaint in the county court at the suit of several parties, the clerk of the defendant's attorney went to one of the plaintiffs, an illiterate person, and obtained his "mark" to a peculiarly-worded release. The judge of the county court, observing that the release was evidently a trick, gave judgment for the plaintiff:—Held, that the circumstances under which the release was obtained, afforded some evidence of fraud, so as to justify the judge in declining to give effect to it.

THIS was an appeal from a decision of the judge of the County Court of Devonshire, at East Stonehouse.

The defendant, Thomas Sargent, was summoned on the 11th of August, 1851, to answer a claim of John Wedlake, William Dunstone, and four others, miners, to *recover the sum of 40*l.* 10*s.* The [*733 summons and particulars were in the following form:—

(Title of court, and parties.)

“ Thomas Sargent, of, &c., yeoman,—You are hereby summoned to appear at a county court to be holden at, &c., on Tuesday, the 2d of September, 1851, to answer John Wedlake, William Dunstone, &c., all miners, to a claim, the particulars of which are hereunto annexed.

(Date, and clerk's signature.)

“ Copy of particulars.

“ In the County Court, &c. : between, &c., &c., all miners, plaintiffs, and Thomas Sargent, of, &c., yeoman, defendant.

“ 1846. To sinking a shaft at Ivy Tor Mine, in the					
parish of South Tawton, three fathoms	-	-	-	50	0 0
“ To putting up a machine	-	-	-	1	0 0
“ To cash paid for turf for drying clothes	-	-	-	0	10 0
					£51 10 0
“ Cr. Cash on account	-	-	-	8	0 0
“ Do. - - - - -	-	-	-	3	0 0
					11 0 0
					£40 10 0

“ Above are the particulars of the plaintiffs' demand in this action.

“ G. G., attorney for the plaintiffs.”

At the hearing of the summons, on the 2d of September, 1851, both the plaintiffs and the defendant appeared by attorney. The defendant pleaded,—first, the general issue,—secondly, payment,—thirdly, a release of all causes of action, by William Dunstone, one of the plaintiffs, on behalf of himself and his co-plaintiffs.

*734] After making these answers, the defendant's attorney *objected that the summons and particulars were insufficient to explain what was the ground of action. The court ruled, that, after the pleas or answers to the effect above mentioned had been received, this objection was too late; and the hearing of the case proceeded.

The plaintiffs proved that work to the amount claimed had been done by them on a contract taken in copartnership, as is usual with men employed in the business of miners, and under the directions of one Vivian, a captain or agent for the shareholders in a mine called Ivy Tor Mine, of which mine the defendant was proved to be a shareholder, and to have attended many meetings in that character, and taken an active part in the conduct of the said mine both before and after the performance of this work by the plaintiffs.

The case for the plaintiffs being closed, a witness was called on behalf of the defendant, who produced a release under seal, and proved its execution by William Dunstone, one of the plaintiffs, who had *affixed his mark thereto*, in the presence of the witness, on the morning of the day on which the cause was heard,—neither of the other plaintiffs, nor their attorney, having had any knowledge of the existence of such a document. The release was as follows:—

“ Know all men by these presents, that I, William Dunstone, of, &c., miner, having been engaged in sinking a shaft and performing other

work at Ivy Tor Mine, in the parish of South Tawton, in the county of Devon, together with John Wedlake (and the other plaintiffs), in the year 1846, do hereby remise, release, and discharge Thomas Sargent, of, &c., yeoman, of and from all claims and demands, past or present, for or on account of any costs, charges, labour, or expenses, actions or causes of actions, already prosecuted or hereafter to be prosecuted, either incurred by the said Thomas Sargent individually, or as a shareholder or adventurer in the *said Ivy Tor Mine, or in any other [*735 manner whatsoever, &c.

The following is a copy of the judge's note of the evidence given by this witness. It was set out in the case by the desire of the appellant: it was not to be taken to be a full note of all he said; but it contained the substance of his testimony.

"Thomas Milton: I know William Dunstone, the plaintiff. I saw him execute this deed this morning, and attested it(a) in his presence.

"Cross-examined: I am a clerk in the office of Childs & Peter, attorneys, of Liskeard. I went to look for Dunstone at Menhemot. He told me he was no party to this action. I explained the purport of this deed to him; and he executed it."

No evidence was called, in reply, by the plaintiffs, to contradict or impeach this. The court reserved its judgment until the 16th of September, and then gave a judgment for the plaintiffs, for the full amount claimed,—*remarking, that the release was evidently a trick.*

The questions for the opinion of this court, were,—first, whether the summons and particular sufficiently disclosed and explained a ground of action against the defendant; and, if not, whether the objection to their sufficiency ought to have been allowed by the judge after the pleas had been received,—secondly, whether the judge was bound to give effect to the release executed by Dunstone, as above set out; or whether it was open to him, upon a consideration of all the circumstances of the case, and a general view of all the evidence given on the trial, to consider it, as he did, fraudulent, and to give no effect to it.(b)

*Collyer, for the appellant.—1. The summons and particular [*736 disclosed no ground of action. It is not suggested that the work was done at the defendant's request, or that he in any manner authorized it. The 75th section of the county-court act, 9 & 10 Vict. c. 95, expressly enacts "that no evidence shall be given by the plaintiff on the trial of any such cause as aforesaid, of any demand or cause of action except such as shall be stated in the summons thereby directed to be issued." By a summons in this loose form, the defendant, contrary to the declared intention of the legislature, is brought into court without having any previous information as to the nature of the case which is

(a) With the formalities usually observed where the party executing is a marksman.

(b) The case was settled by the judge, the parties not having been able to agree on a statement thereof.

intended to be made against him. An objection to the sufficiency of the plaint may be taken at any time, and is not cured by pleading to it. Formal pleas are not required in the county court,—s. 74. [MAULE, J. The 78th section empowers certain judges of the superior courts to frame general rules of practice and forms of procedure in the county courts, and enacts, that, in any case not expressly provided for therein, or by the said rules, the general principles of practice in the superior courts of common law may be adopted and applied, at the discretion of the judges, to actions and proceedings in their several courts. Now, by the practice of the superior courts, certain objections of form are required to be taken at the earliest practicable moment. That is a principle of reason and justice. If a defendant, instead of demurring when he may do so, pleads or enters into an inquiry of fact, he waives the formal objection.] This is not a mere objection of form: it is matter of substance; and it is not like an objection taken after verdict, or in arrest of judgment; it was urged before the hearing of the plaint.

2. If there was no evidence of fraud in the preparation of the release, the judge was wrong in declining to give effect to it. The evidence set *737] out clearly shows *nothing like fraud. [WILLIAMS, J.—In *Rawstorne v. Gandell*, 15 M. & W. 304,† it was held that the court will not set aside a plea of release by one of several co-plaintiffs, unless it is clearly shown to have been made in fraud of the other plaintiffs, or unless the releasor be a mere nominal party to the action, having no interest whatever in the subject-matter of it.] There was no suggestion at the trial that the release was fraudulent. [MAULE, J.—There is nothing said about fraud, except at the end of the case, where it is said that “the court gave judgment for the plaintiffs for the full amount claimed,—remarking, that the release was evidently a trick.” It is quite immaterial what remarks the judge makes, so that the judgment is right. The judge here finds that the release was not duly executed.] The evidence shows that the deed *was* executed. [MAULE, J.—The judge may not have believed the witness. WILLIAMS, J.—You admit that the judge might have treated the release as a nullity, if fraudulent: and there is no machinery in the county court to set aside the plea.] Undoubtedly, the judge might have disregarded the release, if the evidence warranted him in coming to the conclusion that it had been obtained by fraud. But here he professes to set out the evidence which was given in respect of the release: and it clearly would have been misdirection to have told a jury that there was *any* evidence of fraud.

E. W. Cox, for the respondents.—The question here is, whether it is competent to this court to entertain a matter of fact which has been disposed of in the county court. There are only three cases in which jurisdiction is given to this court,—misdirection of the judge in point of law, or the improper admission or the improper rejection of evi-

dence.(a) Whether the judge was justified *in coming to the conclusion that the release was fraudulent or not, is a question [*738 of fact, unless he was conclusively bound by the release. [MAULE, J.—Suppose there was nothing to impeach the deed,—would not the judge be bound to tell the jury that there was no evidence upon which they could find fraud?] Probably he would: but here, the whole surrounding circumstances teemed with fraud. It is impossible for the court sitting here to form a judgment as to whether or not the judge came to a right conclusion. [TALFOURD, J.—The affirmative of the issue of fraud was upon the plaintiffs. If there was *any* evidence of fraud, I think we cannot review the decision of the judge.] No doubt, if it was competent to the judge, upon the facts which were before him, to treat the release as fraudulent, his decision is final.

Collyer, in reply.—There was *no* evidence of fraud: the execution of the release was proved; and no attempt was made to impeach it. It cannot be denied that it is competent to one of several plaintiffs, even from motives of friendship for the defendant merely, to release a cause of action on behalf of himself and his co-plaintiffs, provided it is not done fraudulently. [MAULE, J.—The releasing plaintiff and the others undoubtedly had a good cause of action against the defendant. The releasing plaintiff being a marksman, an illiterate person, the defendant's attorney's clerk goes to him on the morning of the trial, and gets him to execute this singularly-framed release. The judge probably, and not improperly, thought that was some evidence of fraud.] The deed was read over and explained to the party before he executed it. In the absence of evidence to the contrary, it must be presumed to have been executed *bonâ fide*. To tell a jury that they might under circumstances like these presume fraud, would be a misdirection.

*MAULE, J.—It is unnecessary for us to say how we should have found the fact; it is enough to say that we think there was [*739 some evidence of fraud.

WILLIAMS, J.—The circumstances under which the release was obtained, and the absence of any explanation by Dunstone, abundantly justified the conclusion that it was fraudulent.

TALFOURD, J.—I also think there clearly was evidence of fraud.

Judgment for the respondents, with costs.

DANIELS, Appellant; CHARSELEY, Respondent. Dec. 1.

A defendant against whom judgment had been recovered in a plaint in the county court on the 17th of January, on the 22d gave a notice of appeal, in which was set forth the grounds of appeal, and on the 23d entered into a bond, with a surety, for the costs of the appeal, and for the amount of the judgment; on the 24th he withdrew the notice of appeal, and gave a fresh one stating new grounds of appeal:—Held, that the bond given on the 23d was a sufficient compliance with the 14th section of the 13 & 14 Vict. c. 61, and that it was competent to the court to entertain the appeal.

In 1846, the defendant entered into the service of the plaintiff, a solicitor at Amersham, as his clerk, and, in December, 1849, the plaintiff put an end to the service, by a notice, to expire on the 25th of March, 1850. On the 7th of January, 1850, the defendant wrote to the plaintiff, asking to be paid his salary to Lady-Day, and to be at once discharged, "in order that he might go to London and remain there until he could meet with another engagement." To this letter the plaintiff replied, assenting to the defendant's proposal, saying—"Of course, I should have expected your services, if you were in Amersham; but, as you request me at once to pay your salary to Lady-Day, in order that you may go to town until you meet with another engagement, I consent to accord your request:" and, on the following day, the plaintiff asked the defendant whether, "if he paid him up to the 25th of March, he intended going to town and remaining there till he got another engagement," to which the defendant answered that he did; whereupon the plaintiff said,—“on these conditions, I am prepared to pay your salary at once up to Lady-Day; but, if you remain in Amersham, I shall expect your services,”—and accordingly paid him the full quarter's salary. The defendant went to London, but shortly afterwards, and before Lady-Day, returned to Amersham at the request of a client of the plaintiff's, in whose employ he remained, giving professional advice:—

Held, that there was no evidence of a contract on the part of the defendant to go to London and remain there, or to forbear to give his services in Amersham to any person other than the plaintiff, or to render service to the plaintiff if he should return to Amersham.

The successful party on an appeal from a decision of a county court, is entitled to the costs of the appeal.

THIS was an appeal from a decision of the judge of the county court of Buckinghamshire, at Chesham. The plaint was as follows:—

*740] “You are summoned to appear at, &c., on, &c., to *answer the plaintiff by reason of the defendant's breach of contract in rendering his services to other persons than the plaintiff, at Amersham and in the neighbourhood of it, between the 9th of January, 1850, and the 25th of March, 1850, contrary to his agreement with the plaintiff: and also by reason of the defendant's breach of contract in not going to and remaining in London after the 9th of January, 1850, until he there met with another engagement, according to his promise and undertaking to the plaintiff so to do, made on or about the said 9th of January, in consideration of the plaintiff's then paying him 31*l.* 5*s.* for his salary, as clerk to the plaintiff, up to the said 25th of March, 1850: and also for the defendant's not giving his services to the plaintiff as such clerk as aforesaid, whilst the defendant remained at Amersham after the said 9th of January, up to the said 25th of March, 1850, as he ought to have done, under his promise and undertaking, the particulars of which are hereunto annexed.”

The particulars of demand were in substance a repetition of the causes of action mentioned in the summons.

The cause was tried on the 17th of January last, when the following

facts were proved on the part of the plaintiff:—The plaintiff was a solicitor, carrying on business at Amersham, in Buckinghamshire. On the 10th of January, 1846, he engaged the defendant as his clerk, under a written agreement, at a salary of 150*l.* per annum, payable weekly. The agreement contained the *following stipulations:—“In case [*741 the said Thomas Daniels should wish to leave the service of the said Frederick Charsley, he shall give to the said F. Charsley three calendar months’ notice; but if, within the space of seven days after the said T. Daniels shall have given such notice, the said F. Charsley shall give to the said T. Daniels notice that he shall not require the services of the said Thomas Daniels beyond the expiration of one calendar month from the time the notice was given to the said F. Charsley by the said T. Daniels, then the engagement shall cease at the end of such month, up to which time the salary shall be payable, and no longer. In case the said F. Charsley shall wish to part with the said T. Daniels, he shall give the said T. Daniels three calendar months’ notice of such his intention; but if, within the space of seven days after the said F. Charsley shall have given such notice, the said T. Daniels shall give the said F. Charsley notice to quit the service of the said F. Charsley at the expiration of one month from the time the notice by the said F. Charsley was given to the said T. Daniels, then the said T. Daniels shall be at liberty to quit at the expiration of such month.”

The defendant entered into the service of the plaintiff under the above agreement, and continued therein till the time hereinafter mentioned. On the 24th of December, 1849, the plaintiff sent the following letter to the defendant:—

“I have made arrangements with my brother Edward, to admit him a partner in my practice. We shall not, therefore, require that assistance which you have rendered me during the last four years. At the time that you entered my office, the arrangement made between us was, that, in case of my not requiring your services, I was to give you three months’ notice. As my brother’s partnership will commence at Lady-Day next, it is right that I should inform you of the arrangement made. It *is my wish to act liberally towards you; and I wish [*742 you to understand that you are at liberty to leave my office at any time prior to the expiration of the three months, if you can meet with another engagement; and I shall feel pleasure in rendering any assistance in my power in furthering your plans.”

To this the defendant replied on the 7th of January, 1850,—

“From the tenor of your letter to me of the 24th ultimo, I understand that the sooner I leave this place the more consonant it will be to your feelings; and I confess it will now be the same to mine. On Friday last, I went to London with the hope of getting an engagement; but I was too late in my application; and need scarcely point out to you the probabilities that this will happen in almost every instance, while

I remain here; and, therefore, as you say in your letter that you wish to act liberally towards me, and have also intimated that I may leave as soon as I can get another situation, and that you will pay me my salary up to the 25th of March, I have to ask whether you will pay me my salary at once up to that period, and discharge me from your service, *in order that I may go to London and remain there until I can meet with another engagement.*"

On the same day, the plaintiff wrote to the defendant, as follows:—

"I can quite understand that it will be more convenient to you, to enable you to obtain another situation, that you should be in town. Although, as you are aware, it will somewhat inconvenience me to be without your assistance until my brother Edward can join me, I am unwilling to hinder you; and I will therefore at once pay your salary up to the 25th of March next, *with the view of your going to town.* You must allow me to observe that my letter to you of the 24th ultimo does not convey any intimation that the sooner you leave Amersham the *743] *more consonant it will be to my feelings: but I wish you to understand, that, as my arrangement to take my brother Edward into partnership will oblige me to dispense with your services, I wish to act liberally towards you, by allowing you to leave prior to the expiration of the three months, provided you meet with another situation. *Of course I should have expected your services, if you were in Amersham;* but, as you request me at once to pay your salary to Lady-Day, *in order that you may go to town until you meet with another engagement,* I consent to accord your request, and shall be glad to hear that you have been successful."

Evidence was offered on the part of the plaintiff,—and, after objection on the part of the defendant, admitted by the judge,—to show that the following conversation took place between the plaintiff and defendant on the 8th of January, 1851:—The plaintiff said to the defendant, "I am prepared to complete the agreement I made with you yesterday;" and he then asked the defendant whether, "if he (the plaintiff) paid him (the defendant) up to the 25th of March, he (the defendant) intended going to town, *and remaining there till he got another engagement.*" To this the defendant answered, that "he did, as it was no use remaining in Amersham, inasmuch as, though he might see advertisements for a clerk while in Amersham, there might be forty or fifty applications before he could get to London:" whereupon the plaintiff replied,—"*I quite understand you; and, on these conditions,* am prepared to pay your salary at once up to Lady-Day; but, *if you remain in Amersham I shall expect your services.*" And the defendant, in answer to a question of the plaintiff, stated that he intended to leave Amersham for London on Monday, the 14th of January: and the plaintiff said,—"*On that condition,* I am prepared to pay the salary at once up to Lady-Day: but, if you are remaining in Amersham, I shall

expect your services." The plaintiff *then asked the defendant if he had nearly completed the schedule of deeds for Messrs. Weller,—being a schedule which the defendant had prepared while acting as clerk to the plaintiff: and the plaintiff also asked the defendant whether the defendant had any objection to let the plaintiff have a copy of such schedule, as it might be useful to him; to which the defendant replied, "You ought to make me some allowance for it; it was a work of great labour:" and thereupon the plaintiff said he had no objection to give the defendant 5*l.* for it; and the plaintiff stated he apprehended *he* could have charged Messrs. Weller for such deeds. [*744]

The plaintiff further stated that he had a meeting with the defendant on the 9th of January, and asked the defendant whether he had brought the schedule of deeds; to which the defendant replied in the negative, adding that he thought it right to mention the matter to Messrs. Weller, and they wished to keep the schedule themselves. The plaintiff further proved, that, on the same 9th of January, he paid the defendant 43*l.* 15*s.*, part of which, viz., 31*l.* 5*s.*, was paid in advance, as for the defendant's salary from that day to the 25th of March then next; and that the defendant quitted the plaintiff's service on that day, and left Amersham on the 14th or 15th of January, and went to London, and returned to Amersham on the 24th or 25th of the same month, and continued to reside there up to and after the 25th of March, and during that interval transacted business for the said Messrs. Weller, as their attorney.

It was further proved by Mr. William Weller, of Amersham, that, after the 9th of January, 1850, and towards the end of that month, he gave instructions to one Taylor, his clerk, to write to the defendant, whom he understood to be then in London, to request the defendant to meet him and his partner at Cranford Bridge, but without stating for what purpose; that the defendant *shortly afterwards did meet the said William Weller and his partner at Cranford Bridge, and that he was then requested by the said William Weller and his partner to prepare, and did then prepare, an agreement for the lease of a public-house, between Messrs. Weller and one Graham. Mr. William Weller further stated, that, within two or three days after the preparation of the last-mentioned agreement, a negotiation took place between him and the defendant on the part of Edward Weller, for a dissolution of their partnership; and that, the defendant being then out of employ, they the said Messrs. Weller requested him to undertake for them the management of that business, to which request the defendant acceded; and that thereupon the defendant was engaged by Messrs. Weller to prepare, and that he did in fact prepare, the agreement for such dissolution of partnership. William Weller further stated, that, from the time of the preparation of the last-mentioned

agreement, up to the 25th of March, 1850, the defendant was engaged at the counting-house and place of business of the said Messrs. Weller, in Amersham, transacting various matters of business having reference to their affairs, and in preparing instructions for various deeds and other documents having reference to the dissolution of their partnership; and that, on one occasion during that period, the defendant was also employed by him, the witness, to purchase a certain property for him of the trustees of one Catherine Toms, the conveyance of which to the witness was perused on his behalf by the defendant, at his request; and that, in that transaction, *the plaintiff* acted as the solicitor to the vendors.

Upon cross-examination, William Weller stated, that, before the defendant became clerk to the plaintiff, he was the clerk of one Taylor, a solicitor of Amersham; that he, W. Weller, had been a client of Taylor's up to the time of his leaving Amersham; that, on Taylor's *746] leaving Amersham, the defendant entered into the employ of the plaintiff, and that he (Weller) then became the client of the plaintiff because of his having known the defendant whilst he was Taylor's clerk, and having confidence in the defendant's professional skill and ability; that the various matters of business so transacted as aforesaid by the defendant for him, Weller, and his partner, up to the said 25th of March, 1850, were of a strictly confidential nature; that they involved the examination and arrangement of deeds and other documents which they would not have permitted to be examined and arranged except upon their own premises; and that, if he the said William Weller and his partner had not employed the defendant, they would not have employed the plaintiff to transact the said business for them. Weller likewise proved that he had not yet advanced or paid any money in respect of the said business.

It further appeared, on the cross-examination of the plaintiff, that, although he knew that the defendant was in Amersham during the period aforesaid, and that during that time he was so employed as aforesaid, he never remonstrated with the defendant on the subject, nor ever made any application to the defendant for his services as such clerk as aforesaid.

No evidence was given, on the part of the defendant, that, after he had returned to Amersham, he ever offered to act as the plaintiff's clerk.

The defendant stated, that, on the 24th of January, 1850, being then in London, he received a letter from Messrs. Weller, which letter he had lost or destroyed; and he proposed to give secondary evidence of its contents: but the judge refused to receive it. He then proved, that, about the 14th or 15th of January, 1850, he left Amersham, and went to London for the purpose of seeking for a situation; that, upon arriving

in *London, he advertised for and made efforts to obtain a situation, and remained in London until the 24th or 25th of the same month, when he left London in consequence of the communication from Messrs. Weller. [*747]

It was insisted, on the part of the defendant, that there ought to be a nonsuit, or a verdict for him, on the following grounds,—first, that the letters of the 7th of January, 1850, before set forth, even if taken in connexion with the conversation of the 8th of January, the evidence of which had been so objected to on the part of the defendant as aforesaid, did not amount to evidence of a contract at all; but that the effect of them was, merely to discharge the defendant from the service of the plaintiff, as from the said 7th of January; and that it appeared from those letters that the said sum of 31*l.* 5*s.*, so paid by the plaintiff to the defendant as aforesaid, was nothing more than a gratuity by the former to the defendant;—secondly, that, assuming the letters and conversation *did* amount to evidence of a contract, they did not show any such contract as was set forth in any of the counts of the plaint;—thirdly, that, even assuming that they *did* show any such contract as was set forth in any of the counts of the plaint, the evidence given on behalf of the defendant proved a *bond fide* performance of such contract on his part. And it was further contended, that, at all events, the plaintiff had failed to show that any damage had arisen from the defendant's alleged breach of contract.

The judge directed a verdict to be entered for the plaintiff for 31*l.* 5*s.*

The defendant thereupon, on the 22d of January, 1851, gave notice of appeal, stating that he was dissatisfied with the determination of the judge “on several points of law submitted to him on such trial on the defendant's behalf,” and that the judge had improperly *rejected evidence. And on the 23d, he, jointly with a surety, entered [*748] into a bond as follows:—

“Know all men by these presents, that we, Thomas Daniels, of, &c., and William Weller, of, &c., are jointly and severally held and firmly bound to Frederick Charsley, of, &c., in the penal sum of 200*l.*, to be paid to the said Frederick Charsley, &c., sealed, &c. Whereas, at a county court held at Chesham, on the 17th of January, instant, the said Frederick Charsley obtained a judgment against the said Thomas Daniels for payment of the sum of 31*l.* 5*s.*, for damages by him sustained, together with the costs of suit, amounting to the sum of 11*l.* 7*s.* 10*d.*, which sums the said Thomas Daniels was ordered to pay to the clerk of the said court, at his office in Chesham, forthwith; which said judgment still remains unsatisfied: And whereas the said Thomas Daniels has given notice to the said Frederick Charsley of his intention to appeal against the said judgment, pursuant to the said statute in that behalf: Now, the condition of the above obligation is such, that,

if the said Thomas Daniels shall duly pay the costs of the said appeal, whatever be the event of the appeal, and the amount of the said judgment, in case the appeal be dismissed, then this present obligation shall be void and of none effect; otherwise, to remain in full force and virtue.

“THOMAS DANIELS.

“WILLIAM WELLER.

“Approved of by me,

“J. D. FRANCIS, clerk of the county court of Buckinghamshire, at Chesham.”

“Signed, sealed, and delivered by the said Thomas Daniels and William Weller, in the presence of } JAMES WATSON.”

*749] On the 24th of January, 1851, the above notice of *appeal was withdrawn, and another one substituted, as follows:—

“In the county court, &c.

“I, Thomas Daniels, the above-named defendant, do hereby give you notice, that I am dissatisfied with the determination in point of law of J. H. Koe, Esq., the judge of the said county court, of, &c., made and given by him on the trial or hearing by him of this cause, on the 17th of January now instant, and also with the said judge on the said trial; and that I intend to appeal against the determination of the said J. H. Koe, judge of the said county court, of, &c., made and given on the trial of the said cause as aforesaid, to Her Majesty’s Court of Common Pleas at Westminster, on the grounds that I am dissatisfied with such determination as aforesaid, and also with the improper admission and rejection by the said judge on such trial, of evidence then tendered on behalf of the plaintiff and defendant in the said cause, respectively. Dated, &c. (Signed) “THOMAS DANIELS.”

“To Mr. F. Charsley, the above-named plaintiff.”

No other bond than that above mentioned was entered into by or on behalf of the appellant.

The respondent having declined to concur in or settle the case sent to him by the appellant,—alleging that the bond having been given with reference to the notice of appeal of the 22d of January, and not with reference to that of the 24th, which contained totally different grounds of appeal, the defendant must be taken to have waived or abandoned his right to appeal,—the judge of the county court settled and signed the case, and it was transmitted to this court with the plaintiff’s protest annexed thereto.

Upon the appeal being called on,

*750] *Lush*, for the respondent, objected that the *requirements of the statute had not been so complied with as to entitle the appellant to be heard. The 14th section of the 13 & 14 Vict. c. 61, which gives the appeal, enacts, “that, if either party in any cause of the amount to which jurisdiction is given to the county courts by that act,

shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster, two or more of the puisne judges whereof shall sit, out of term,^(a) as a court of appeal for that purpose, provided that such party shall, *within ten days after such determination or direction*, give notice of such appeal to the other party, or his attorney, and also give security, to be approved by the clerk of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant and the appeal be dismissed: provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the county court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the county court in which such action shall have been tried, and the same shall have been paid accordingly; and the said court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such court may think proper; and such orders shall be final." The appellant here has not given an available security for the amount of the judgment and the costs of the appeal,—“the said appeal” mentioned in the condition of the bond, being the *appeal of which notice had been given on [*751 the preceding day. That notice being withdrawn, the appeal was abandoned. The appeal, notice of which was given on the 24th of January, was upon totally different grounds, and was not the appeal in respect of which the security was given. [MAULE, J.—It might be that the newly-inserted ground of appeal would involve so expensive an inquiry and discussion, that the party who consented to become security under the former notice, would have withdrawn from the responsibility, if he had known it.]

Montagu Chambers (with whom was *Russell*), *contra*.—The court has no power to entertain this objection. At the time this notice of appeal was given, there were no rules requiring the notice to be in any particular form. The statute does not require a statement of the *grounds* of appeal: a notice in the general form, therefore, was enough; like a notice of appeal from the sessions. The bond itself,—which is to be given to the satisfaction of the clerk of the court,—is all that the court can look to. The abandonment of one notice, and the substitution of another, clearly could not vitiate the bond, especially as the new notice was given within the time prescribed by the statute. If the surety has been misled by anything that has been done, or involved in a larger amount of responsibility than he contemplated, he may possibly have a remedy against his principal: but there is nothing to affect the validity of the bond.

(a) Altered by 15 & 16 Vict. c. 54, ss. 2, 3.

MAULE, J., after consulting the other judges,^(a)—I think we may hear the case.

Chambers, for the appellant.—The facts are shortly these:—In 1846, the defendant entered the service of the *plaintiff as his clerk,
 *752] and that relation was put an end to by the plaintiff's letters of the 24th of December, 1849, and 7th of January, 1850. There is no stipulation in either of those letters that the defendant should not serve a new master in Amersham: but the plaintiff seeks to extend that contract, by praying in aid a subsequent conversation between himself and the defendant. There is not a word in the correspondence intimating that the defendant contracted not to render his services to any other person in Amersham and its neighbourhood. The utmost extent of the contract was, that the defendant would leave Amersham, and go to London for the purpose of obtaining another engagement. What was there to prevent his accepting a fresh situation in Amersham? In the second count, as it is called, of the plaint, the construction the plaintiff seeks to put upon the contract is, that the defendant undertook to go to London and to remain there until he should there meet with another engagement,—than which nothing could be more absurd. The next complaint is that the defendant did not give his services to the plaintiff whilst the former remained in Amersham between the 9th of January and the 25th of March. No contract to do this can fairly be inferred from the letters. And it is expressly found that his services were never asked for. The contract was in fact performed. The defendant went to London. Upon the invitation of Weller, he returned to Amersham, to do work on his own account, not to serve a rival attorney. He, therefore, literally performed his engagement with the plaintiff. There was no pretence for saying that any damage whatever resulted to the plaintiff from the defendant's conduct; for, Weller swore, that, if he had not employed the defendant to transact the business he did, he certainly would not have employed the plaintiff; and yet the judge decided that the defendant was bound to return the 31*l.* 5*s.* received by him for salary between the 9th of January and the 25th of
 *753] March. [MAULE, J.—*And as liquidated damages too!] Then, as to the rejection of evidence,—the letter of Messrs. Weller inviting the defendant to meet them at Cranford Bridge, was an important piece of evidence. It was proved to have been sent, and to have been received by the defendant, and lost or destroyed. Secondary evidence of its contents, therefore, should have been received. If the case rested upon that ground only, the appeal must be allowed.

Lush, for the respondent.—The first ground urged is no ground of appeal: whether there was a contract, and what the contract was, was entirely a question for the judge. No doubt, if there be a formal contract in writing, and the judge puts an incorrect construction upon it,

(a) CRESSWELL, J., WILLIAMS, J., and TALFOURD, J.

that may be an erroneous decision in point of law. But that is not this case. The contract with a breach of which the plaintiff charged the defendant, is made up of the letters, and the subsequent conversations and conduct of the parties. If the case had been tried in a superior court, the judge could not have taken upon himself to decide it; but must have left it to the jury. [MAULE, J.—It will not be denied, that, if there was any evidence of the contract stated in the plaint, the decision is not the subject of appeal.] What was the evidence? The defendant had represented to the plaintiff that he was desirous to go to London to look out for employment. The plaintiff, in reply, assents to his doing so, and agrees to pay him salary up to the 25th of March, “in order that he might go to town until he should meet with another engagement,”—at the same time intimating that he should have expected to have his services if he remained in Amersham. The letters alone do not amount to a complete contract: but it is made complete by the conversation of the following day. [WILLIAMS, J.—How long was the defendant to stay in London?] He was to *stay away from Amersham, or render his services there to the plaintiff, until the [*754 25th of March. [MAULE, J.—He could not intrude his services: he must wait till he is asked.] He was bound to tender his services, if he did not choose to abide by the terms upon which he left. The whole was evidence of a contract. [WILLIAMS, J.—To do what?] To go to London, and to stay away from Amersham; or, if he returned, to return to the plaintiff's service. [MAULE, J.—I see no evidence of any such contract: the defendant has entered into no engagement not to serve anybody else in Amersham.] Such a contract may reasonably be inferred. [MAULE, J.—We cannot infer anything. There is nothing either in the letters or in the conversations which point out any apprehension on the part of the plaintiff that his clerk was going to be his rival in Amersham.]

MAULE, J.—We need not trouble you on the other points, or Mr. *Chambers* on this one. The appeal must be allowed.

Chambers asked for the costs of the appeal, stating that it was the practice in the Queen's Bench and Exchequer to give costs where the appeal is allowed.

Lush, contrà.—It is not usual in any case to give costs, where the matter arises from the mistake of the judge.

Chambers.—It must always in these cases be the mistake of the judge that gives occasion for the appeal.

MAULE, J.—Considering the nature of the action, I think the appellant ought to have the costs of the appeal.

The rest of the court concurring,

Appeal allowed, with costs.(a)

(a) It is now understood to be a settled rule, in all the courts, that costs are to be awarded to the successful party.

*755] *MACDOUGALL v. PATERSON. Dec. 5.

Where a statute confers an *authority* to do a judicial act in a certain case, it is *imperative* on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application.

The word "may," in the 13th section of the county courts extension act, 13 & 14 Vict. c. 61,—which provides, that, in certain cases, the court or a judge at chambers *may* by rule or order direct that the plaintiff shall recover his costs,—is not used to give a *discretion*, but to confer a *power* upon the court and judges: and the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises.

Where a man, having his permanent residence at one place, has a lodging, for a temporary purpose only, at another place,—he does not "dwell" at the latter place, within the meaning of the 128th section of the county court act, 9 & 10 Vict. c. 95, so as to oust the jurisdiction of the superior courts.

Where a plaintiff has *two places of abode*, one within, the other beyond twenty miles from the defendant,—*quære* whether the superior courts have not concurrent jurisdiction with the county court.

THIS was an action upon a promissory note for 9*l.* 6*s.* 6*d.* (by payee against maker), tried as an undefended cause before the sheriff of London, on the 23d of July last, when a verdict was taken for the plaintiff for the amount of the note and interest.

On the first of August, the plaintiff took out a summons calling upon the defendant, under the 13th section of the county court extension act, 13 & 14 Vict. c. 61, to show cause why the master should not tax and allow to the plaintiff his costs of the action, on the ground that the plaintiff and defendant dwelt more than twenty miles from each other. The application was founded upon the affidavit of the plaintiff and his attorney. The former, who described himself as "of Inverness, in the kingdom of Scotland, but at present stopping at 19 B, Golden Square, in the county of Middlesex, woollen-draper," deposed, that, at the time of the commencement of the action, he dwelt and carried on his business more than twenty miles from the places where the defendant dwelt and carried on his business; that he, the plaintiff, at that time dwelt and carried on his business, and still dwells and carries on his business, at

*756] Inverness, *in Scotland, and not elsewhere, and that the defendant dwelt in the county of Surrey, and carried on his business in the county of Middlesex; that he, the plaintiff, usually came to London every summer, for the purposes of his business, but had never had any permanent dwelling or place of business there, but takes lodgings and a show-room for patterns whilst he remains in London, at such part of the town as he may deem most suitable; and that the debt for the recovery of which the action was brought, was, for goods, the orders for a portion of which were received by the plaintiff at Inverness, and the whole sent to the defendant from that place.

Cause was shown against this summons, upon affidavit setting forth the superior advantages, in point of economy and despatch, of proceedings in the county court; and stating, that the plaintiff dwelt and carried on his business of a woollen-draper, at the commencement,

and during the progress, and at the conclusion of this action, at No. 19 B, Golden Square, in the county of Middlesex; that the plaintiff so dwelt and carried on his business at that place every year, and had continued from before and at the commencement, and during the progress, and at the conclusion of this action, to dwell and carry on his said business there; that No. 19 B, Golden Square, is within twenty miles of the dwelling-place, and within twenty miles of the place of business of the defendant, that is to say, within three miles of the dwelling-place, and within one mile of the place of business of the defendant, respectively, and that No. 19, Golden Square, is within a few hundred yards of the Westminster County Court of Middlesex.

PATTESON, J., before whom the summons was heard, dismissed the application, endorsing thereon,—“Summons dismissed. I think there was concurrent jurisdiction, but no sufficient reason given why plaintiff sued in the superior court.”

**Badeley*, on a former day in this term, obtained a rule nisi to the same effect.—The learned judge, in deciding as he did, [*757 acted upon the opinions expressed by the Courts of Exchequer and Queen’s Bench, in *Jones v. Harrison*, 6 Exch. 328,† 2 L. M. & P. 257, and *Latham v. Spedding*, 20 Law Journ. N. S., Q. B. 302, that the 13th section is discretionary only. These decisions, however, have not been received with satisfaction: the judges of this court have been understood to hold that “may” ought to be construed “shall.” [WILLIAMS, J.—I never so *decided*; I merely intimated an opinion to that effect to my Brother MARTIN.] It is not matter of discretion: if there is concurrent jurisdiction, the judge is bound to allow the plaintiff his costs. The 2d section of the 13 & 14 Vict. c. 61, enacts that that act and the 9 & 10 Vict. c. 95, and 12 & 13 Vict. c. 101, shall be read and construed as one act, as if the several provisions in those acts contained, not inconsistent with the provisions of that act, were repeated and re-enacted therein. It is necessary, therefore, to refer back to the 128th section of the 9 & 10 Vict. c. 95, which enacted “that all actions and proceedings which before the passing of that act might have been brought in any of Her Majesty’s superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the county court shall be a party, except in respect to any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof, may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if that act had not been passed.” Then *comes the 13th section of the 13 & 14 Vict. c. 61, which enacts that, “if [*758 in any such action (in the superior court), whether there be a verdict in

such action or not, the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at chambers, upon summons, that the said action was brought for a cause in which concurrent jurisdiction is given to the superior court by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in any such county court, or that the said cause was removed from a county court by *certiorari*, then and in any of such cases the court in which the said action is brought, or the said judge at chambers, *may* thereupon, by rule or order, direct that the plaintiff shall recover his costs; and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if that act had not been passed." Regard being had to the 2d section, it is impossible, giving effect, as we are bound if possible to do, to every word we read, to hold the legislature to have meant to give the plaintiff, in the cases specified, the election to avail himself of either jurisdiction, and then to mulct him of costs for exercising it. The plaintiff's right to costs under the statute of Gloucester^(a) is not to be taken away by implication and inference. It never could have been intended that the merits of the cause should be tried over again, upon affidavit. [MAULE, J.—The word "may" possibly may be referred to the contingency of the costs being asked for. The judge is to do what is right.] A rule nisi having been granted,

Lush, on a subsequent day, showed cause.—It is not obligatory, but *759] discretionary with the judge to allow or *to refuse costs under this statute. The 11th section shows the paramount intention of the framers of the act to have been, that, as a general rule, plaintiffs recovering in the superior courts sums not exceeding 20*l.* in actions of contract, or 5*l.* in actions of tort, over which the county court has jurisdiction, are to have no costs. They then proceed to engraft upon that provision certain exceptions; the 12th section enabling the judge to give the plaintiff costs by certifying on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in the county court, or that it appeared to him that there was a sufficient reason for bringing the action in the superior court; and the 13th section empowering a judge at chambers to allow the plaintiff costs, upon its being made to appear to his satisfaction that there was a sufficient reason for suing in the superior court. In *Jones v. Harrison*, 6 Exch. 328,† 2 L. M. & P. 257, where the section was held to be discretionary, PARKE, B., said: "The rule which the courts have constantly acted upon of late years, in construing acts of parliament or other instruments, is, to take the words in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument, to be collected from its terms, or would lead to some other

(a) 6 Edw. 1, c. 1.

inconvenience or absurdity. Now, the word used in this case, 'may,' according to its ordinary construction, is permissive; and, although Mr. *Bovill's* ingenious argument has led my mind to doubt a little, it has not rendered it clear to me that the legislature in this section did not use the word in its ordinary sense. I think we ought to abide by that rule of construction, and, in doing so, I cannot see any satisfactory reason why the word 'may' here should not be so read. In many cases which come before them, the court or judge *might think it right to exercise their discretion by disallowing a plaintiff costs, [*760 and I am not sure the legislature did not mean them to have the power of exercising such discretion." This case was acted upon in *Palmer v. Richards*, 6 Exch. 335,† where it was held, that, where a judge has exercised his discretion, it cannot be reviewed by the court. [JERVIS, C. J.—I have always understood the general practice to be, that, where a matter comes before a judge at chambers upon affidavit, his decision thereon is subject to review.] It might as well be argued that the judge at the trial is *bound* to certify under the 12th section.(a) [JERVIS, C. J.—Is he not bound to certify, if it appears to him that the cause of action was one for which a plaint could not have been entered in the county court?] It is submitted he is not. Under the 43 Eliz. c. 6, s. 2, and also under Lord DENMAN's act, 3 & 4 Vict. c. 24, s. 2, where the judge has exercised his discretion in granting a certificate, the court will not afterwards review it.(b) [JERVIS, C. J.—That is a different thing: there, the judge has to consider whether the action was really brought to try a right besides the mere right to recover damages, or whether the trespass or grievance in respect of which the action was brought was wilful and malicious: here, under s. 13, if certain things are proved to the *satisfaction of the court, or of a judge at chambers, the rule or [*761 order must go. MAULE, J.—There is a considerable difference in the wording of the 12th and 13th sections: under the former, the judge at the trial, when called upon to certify, has to inquire whether or not the cause of action was one for which a plaint could have been entered, or whether there was a sufficient reason for bringing the action in the superior court; but, when you come to s. 13, if it be held to be discretionary in the judge to make the order or not, it will lead to endless and unsatisfactory contests upon affidavit, in every case, before the

(a) The 12th section enacts, "that, if the plaintiff shall, in any such action as aforesaid, recover a less sum than the sum in that behalf thereinbefore (s. 11) mentioned, by verdict, and the judge or other presiding officer before whom such verdict shall be obtained, shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county court as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which the said action was brought, the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this act had not been passed."

(b) See *Shuttleworth v. Cocker*, 1 M. & G. 829 (E. C. L. R. vol. 39), 2 Scott, N. R., 47, 9 Dowl. P. C. 76, *Barker v. Hollier*, 8 M. & W. 513,† *Bury v. Dunn*, 1 D. & L. 141, *Marriott v. Stanley*, 2 Scott, N. R., 60, 1 M. & G. 853.

judge or the court; all which is avoided by making the order depend upon whether it appears that the action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 9 & 10 Vict. c. 95, s. 128, or for which no plaint could have been entered in a county court, or that the cause was removed by *certiorari*,—such plain and definite things, that no great doubt or difficulty could arise as to their existence or non-existence. JERVIS, C. J.—Where the defendant removes the cause by *certiorari*, the plaintiff is bound to go on in the superior court. Suppose the application for a *certiorari* is resisted, according to your argument, a single judge at chambers might decide differently from the judge at the trial or the court *in banc*.] That only goes to regulate the discretion of the judge. The primary intention of the legislature was, to deprive parties of costs where they proceed in the superior courts to recover demands which ought to have been sued for before the inferior tribunal. The right to costs in such cases is exceptional, and introduced by way of proviso: it manifestly was not intended by the legislature to make the awarding of costs in the cases specified absolutely imperative upon the court or judge; and certainly the *prima facie* and natural and ordinary meaning of the word “may,” *762] is, to give a discretion. It was distinctly *so held in *Jones v. Harrison*; and that decision was followed by the Queen’s Bench in *Latham v. Spedding*, 20 Law Journ., N. S., Q. B. 302. That was an action of trespass for breaking and entering the plaintiff’s dwelling-house: the defendant pleaded not guilty and “not possessed;” and, at the trial, the plaintiff obtained a verdict for 40s., and the presiding judge refused to certify that there was a sufficient reason for bringing the action in the superior court. Application was afterwards made to PATERSON, J., at chambers, to give the plaintiffs their costs, under the 13 & 14 Vict. c. 61, s. 13, and that learned judge, conceiving that “not possessed” put in issue the title to land, and ousted the jurisdiction of the county court, thought the section obligatory on him, and accordingly made the order; but the court afterwards rescinded it. Lord CAMPBELL there said: “The learned judge made the order for costs to the plaintiffs, considering that the 13th section was imperative on him to do so, if the case was one which could not have been brought before the county court, and treating the defendant’s plea of ‘not possessed’ as conclusive upon him that the title did come in question, and therefore that the county court could not have entertained the suit,—according to *Timothy v. Farmer*, 7 C. B. 814 (E. C. L. R. vol. 62). At the time of the decision of that case, the initiative as to depriving the plaintiff of costs, lay on the defendant, by the 9 & 10 Vict. c. 95, s. 129; and it might be that he, having pleaded ‘not possessed,’ was concluded from asserting that the title did not come in question. But, by the last act, the *onus* as to costs for the plaintiffs is thrown on the plaintiffs; and we think it clear that they are bound to show that they could not sue

in the county court, by establishing the fact that the title did really and *bond fide* come in issue; not merely that the defendant had so pleaded that it possibly might have come in issue. The *words of the 58th section of the 9 & 10 Vict. c. 95, are, that the court shall [*763 not have cognisance of any action 'in which the title to any corporeal or incorporeal hereditaments *shall be in question.*' We hold that these words mean, shall really and *bond fide* be in question." [JERVIS, C. J.—That is not a decision upon the point which is now before us.]

This is not a case in which concurrent jurisdiction is given by the 128th section of the 9 & 10 Vict. c. 95,—the language of which is, "where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought." It is clear that the cause of action arose where the defendant resided. It appears from the affidavits, taken together, that, although the plaintiff had a residence at Inverness, he also had a residence and a place of business at No. 19 B, Golden Square; and the affidavits show that he was actually domiciled at the latter place, not only at the time the action was commenced, but also at the time the judgment was obtained.

Badeley, in support of his rule.—This clearly was a case of concurrent jurisdiction. The defendant has not, and never had, a *permanent* residence within twenty miles of the defendant's residence; for, that is the plain meaning of the statute. [MAULE, J.—He has a residence proper at Inverness; and he also dwells and carries on his business, from March till the commencement of the shooting season, in Golden Square. A man may have a house in London, and a house at Richmond, and each may properly be called his "dwelling:" but I doubt whether a man who takes lodgings at a watering-place for two or three months, can be said to have a *residence* *or to *dwell* there.] In *Sheils v. Rait*, 7 C. B. 116 (E. C. L. R. vol. 62), it was held that one who resides [*764 in Scotland, and carries on business in London by means of an agent, is not bound to sue in the city small debts court, for a debt within the scope of the 10 & 11 Vict. c. lxxi. A man's residence or dwelling is properly speaking the place where his family is domiciled. Thus, in *Nias v. Davis*, 4 C. B. 444 (E. C. L. R. vol. 56), a prisoner in execution in the common gaol of Radnor,—but having a permanent lodging in London, where his wife and family resided, and to which it was his intention to return,—petitioned the court of bankruptcy for protection from process, under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96: and it was held that he had a sufficient residence within the London district, to entitle him to present his petition there. [MAULE, J.—It is true that the plaintiff dwells at Inverness, which is more than twenty miles from the defendant: it is also true that he dwells at No. 19 B, Golden Square, which is less than twenty miles from the defendant. Assuming that a

man may have a dwelling-house in two places at the same time, he may, as I read the act, have the rights which belong to a man who dwells more than twenty miles off, and also those which belong to a man who dwells less than twenty miles off. There are no negative words in the act.] The court will not curtail the plaintiff's rights beyond the express and positive words of the act. A party's "dwelling" has always been held to be, the place where he and his family permanently reside. Here, the plaintiff's permanent residence is at Inverness, and consequently he had a right to resort to the superior court.

The judge having dismissed the summons, it is competent to the plaintiff to come to the court to review his decision: *Peterson v. Davis*, 6 C. B. 235 (E. C. L. R. vol. 60). [JERVIS, C. J.—This is a substantive *765] application to have the costs: you must *show that the plaintiff is entitled to them, by showing that he dwells more than twenty miles from the defendant.] Upon that point the decision of the judge was in the plaintiff's favour.

Upon the main point, however, the plaintiff is entitled to the order prayed. But for the 9 & 10 Vict. c. 95, s. 129, and 13 & 14 Vict. c. 61, s. 11, the plaintiff would clearly have been entitled to costs under the statute of Gloucester; and that clear right can only be taken away by the express enactment of a statute, or necessary intendment amounting to express enactment. [JERVIS, C. J.—The 11th section does expressly take away costs in the cases therein mentioned. Must you not bring yourself within the exception?] The 128th section of the 9 & 10 Vict. c. 95, enacts that all actions and proceedings which before the passing of that act might have been brought in any of her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, &c., may be brought and determined in any such superior court, at the election of the party suing or proceeding, "as if that act had not been passed." Then comes the 11th section of the 13 & 14 Vict. c. 61, which deprives the plaintiff in actions of certain descriptions of costs, "except in the cases hereinafter provided." Upon this two conditions are engrafted by ss 12 and 13: the former provides that the plaintiff shall have costs, if the judge who presides at the trial shall certify on the back of the back of the record "that it appeared to him at the trial that the cause of action was one for which a plaintiff could not have been entered in the county court," or "that it appeared to him at the trial that there was a sufficient reason for bringing the *766] action in the superior court:" *and the latter provides, that, if the plaintiff shall make it appear to the satisfaction of the court in which the action is brought, or to the satisfaction of a judge at chambers, "that the action was brought for a cause in which concurrent

jurisdiction is given to the superior courts by the 9 & 16 Vict. c. 95, s. 128, or for which no plaint could have been entered in the county court, or that the cause was removed from the county court by *certiorari*." Two things are expressly mentioned in s. 12 as those which the judge at nisi prius is to determine, and three in s. 13 as matters which are to be determined by the court or by a judge at chambers, including one, but excluding the other of the matters which may be the subject of inquiry at nisi prius, viz., whether or not there was a sufficient reason for bringing the action in the superior court. If the rule *Expressio unius est exclusio alterius* holds, this omission shows that it was the intention of the legislature to exclude that matter from inquiry before the judge at chambers: and the great inconvenience of ripping up the whole facts upon affidavit affords a cogent reason for the omission. There is nothing to militate against this conclusion, except the use of the word "may," which under some circumstances, no doubt, is permissive, and not imperative. But there is no such inconvenience or incongruity in holding that word to be obligatory here, as to justify the court in disregarding the otherwise plain and evident intention of the legislature. [JERVIS, C. J.—The word "may" is merely used to confer the authority: and the authority *must* be exercised, if the circumstances are such as to call for its exercise.] Authorities are to be found in the books which fully warrant this construction. In *Rex et Regina v. Barlow*, 2 Salk. 609, upon an "indictment on 14 Car. 2, c. 12, against churchwardens and overseers for not *making a rate to reimburse the constables, exception was taken [*767 that the statute only puts it in their *power* to do so, by the word *may*, &c., but does not *require* the doing of it as a *duty*, for the omission of which they are punishable. *Sed non allocatur*; for, where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*: thus, the 23 H. 6 says the sheriff *may* take bail; this is construed *shall*, for, he is compellable to do so." So, in *Alderman Backwell's case*, 1 Vern. 152, Eq. Cas. Abr. 52, pl. 1, 2, 2 Chan. Cas. 143, 190, where it is laid down that the granting a commission of bankrupt is not discretionary, but *de jure*, Lord Keeper NORTH declared, "that, though the words of the act of parliament(a) were, that the Chancellor *may* grant a commission of bankrupt, yet the word 'may' was in effect 'must,' and it had been so resolved by all the judges." And in Viner's Abridgment, *Statutes* (E. 6), pl. 132, it is said: "It is a rule that *leges posteriores abrogant priores*; but, though this holds *in thesi*, yet it does not hold *in hypothesi*, if the last act be not contradictory or contrary to the former; but, if it be only so far differing or disagreeing that by any other construction they may both stand together, it is otherwise: and so in *Dyer*,

(a) "Shall have power and auctorytie by vertue of this acte," 34 & 35 H. 8, c. 4, s. 1. "Shall have full power and authority by commission under the great seal," 13 Eliz. c. 7, s. 2.

343, 18 Eliz., and 11 Rep. 63 b, Trudgin's case, 21 Eliz., cited there in Foster's case, that, where tenant in tail by the statute of W. 2(a) shall not forfeit the lands, and afterwards 16 R. 2(b) enacts that a man attainted of *præmunire* shall forfeit lands, this shall not be extended but only to lands in fee and for life, and not to lands in tail, and yet all are within the words; and there in Foster's case, the statute of 23 *768] Eliz.(c) gave *20l. a month, to be divided between the King, the poor, and the informer, and afterwards the statute of 28 Eliz.(d) gives seisin to the King, and 35 Eliz.(e) gives liberty to the King to pursue by bill, plaint, or information, yet this does not take away the third part from the informer:" *Per* JONES, J., *Standen v. The University of Oxford*, Sir W. Jones, 22.

JERVIS, C. J.—The court entertain some doubt whether there is sufficient evidence upon the affidavits that the plaintiff dwelt at No. 19 B, Golden Square, at the time of the commencement of the action, and also whether, if he likewise dwelt at Inverness, the case would fall within the 9 & 10 Vict. c. 95, s. 128, and therefore desire time to consider. As to the other point, we see very cogent reasons for differing from the construction put by the Court of Exchequer upon the 13th section of the 13 & 14 Vict. c. 61, in the case of *Jones v. Harrison*, 6 Exch. 328,† 2 L. M. & P. 257. It is important, therefore, that we should not come to a hasty conclusion, and equally so that the matter should not remain undisposed of during the long vacation. We will, therefore, appoint a day after term for giving our judgment herein.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.(g)

The first question in this case, is, whether this court has a concurrent jurisdiction with the county court, under the 128th section of the statute 9 & 10 Vict. c. 95: and we are of opinion that it has.

*769] *The defendant contends, that, at the time of the action brought, the plaintiff dwelt in two places,—in Scotland, and in Golden Square; and, perhaps, even if this *had* been the case, this court would have had concurrent jurisdiction, because it could not in that case have been suggested on the roll that the plaintiff did not dwell more than twenty miles from the defendant. But it is unnecessary to decide that question, because we are of opinion, that, under the circumstances, the plaintiff did not dwell in Golden Square. Each case must depend upon its particular circumstances: but, where a party has a permanent place of dwelling, we do not think that he "dwells," in the

(a) W. 2, c. 4.

(b) 16 R. 2, c. 5.

(c) 23 Eliz. c. 1, ss. 5, 11.

(d) 28 & 29 Eliz. c. 6.

(e) 35 Eliz. c. 1, s. 10.

(g) The judges present at the argument, were JERVIS, C. J., MAULE, J., WILLIAMS, J., and TALFOURD, J.

sense of that word as used in the statute, at a place where he has lodgings for a temporary purpose only.

The second question depends upon the true construction of the statute 13 & 14 Vict. c. 61, s. 13, and is of much importance, not only on account of its general bearing upon the practice of the court, but because we are unfortunately unable, after much consideration, to concur with the Court of Exchequer in the view which they have taken of that section.

We are not disposed to depart from the rule of construction of statutes, so frequently referred to by my Brother PARKE. We consider ourselves bound to adhere to the ordinary meaning of the words used, and to their grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to some manifest absurdity or repugnance. The real point turns upon the meaning of the word "may." Does it necessarily give the courts and the judges a discretion in the three cases mentioned in the 13th section? or, was it used,—and, as we think, aptly and properly used,—to confer upon them an authority in the cases mentioned? or is it doubtful in which of these two senses it was used by the legislature? If *the second is the true meaning, we adhere to the ordinary [*770 meaning of the words used, and to their grammatical construction, by holding that the courts and judges have no discretion when either of the three cases exists upon which the authority arises. If it is doubtful in which sense the word was used, we must consider whether it would not lead to manifest absurdity and repugnance to hold that the word "may" conferred upon the courts and the judges a discretion in all the cases mentioned in that section.

Before the passing of the county courts act, 9 & 10 Vict. c. 95, the plaintiff would have had his costs by the statute of Gloucester (6 Edw. 1, c. 1); and since that act he would have had his costs because the defendant could not have suggested that the plaintiff did not dwell more than twenty miles from the defendant at the time of the action brought. In this state of the law, the statute 13 & 14 Vict. c. 61, was passed, the 11th, 12th, and 13th sections of which refer to costs.

The principal object of the 11th section seems to have been to get rid of the very expensive and dilatory proceeding by suggestion necessary under the former act. In substance, for the purposes of this case, it enacts, that, if in any action of debt commenced in the superior courts, the plaintiff shall recover a sum not exceeding 20*l.*, he shall have judgment to recover such sum only, and no costs, except in the cases thereafter provided: and no suggestion shall be necessary to deprive the plaintiff of costs. The cases thereafter provided are to be found in the 12th and 13th sections, and are of two kinds,—those which may appear at the trial before the judge or other presiding officer,—and those which may be established by affidavit before the court or a

judge at chambers, whether there be a verdict in the action or not. Of the former, two cases are provided for by the 12th section,—the one, where it appears to the judge or presiding officer at the trial that *771] the cause of action was one *for which no plaint could have been entered in a county court,—the other, where it appears to the judge or presiding officer at the trial that there was a sufficient reason for bringing the action in the superior court: and, in either of these cases, if the judge or presiding officer certifies to that effect upon the back of the record, the plaintiff is to have his costs. Of the latter, three cases, and three only, are provided for in the 13th section,—where there is concurrent jurisdiction,—where no plaint could have been entered in the county court,—and where the cause has been removed from the county court by *certiorari*: and, if either of these cases appears to the satisfaction of the court or a judge at chambers, such court or judge may thereupon direct that the plaintiff shall recover his costs.

Is there to be added to these three cases expressly mentioned in the section, a fourth inquiry, independent of, and possibly unconnected with, the specific question before the court or judge, viz., an inquiry into the general conduct of the parties, for the purpose of ascertaining whether the plaintiff is in justice entitled to his costs? No power to institute such an inquiry is expressly given by the 13th section; whereas, the 12th section gives the judge or presiding officer a discretion, and enables him to certify that there was a sufficient reason for bringing the action in the superior court.

The omission from the 13th section, of an authority expressly given by the 12th section, would seem to show that it was not intended to confer upon the court or a judge at chambers a discretion to inquire whether there was sufficient reason for bringing the action in a superior court or not.

Again, it could not be intended that a judge at chambers should have a discretion whether the plaintiff should have his costs, in a case where no plaint could have been entered in the county court, and that a judge at *772] nisi prius *should have no discretion in the same case; and yet, in the 12th section, in addition to the discretion vested thereby in the judge or presiding officer, express reference is made to the case where no plaint could have been entered in the county court,—which would have been unnecessary if in that case also he had a discretion, for, then, the last member of the sentence, giving a general discretion, would have included all cases.

To take the instance common to the 12th and 13th sections,—the 11th section may be read thus:—If, in any action of debt, the plaintiff shall recover in a superior court a sum not exceeding 20*l.*, he shall have judgment to recover such sum only, and no costs, except in the case where no plaint could have been entered for the cause of action in the county court; in which case, if it appears to a judge at nisi prius, he

shall certify the same upon the back of the record, or, if it appears to the satisfaction of a judge at chambers, he "may,"—that is, he has authority to,—direct that the plaintiff shall have his costs. Critically speaking, the word "may" is correctly used to describe the sort of authority which a judge has in such cases. He is not bound to act against the plaintiff's wish; but, the fact being established which gives the authority, he may, at the plaintiff's request, make the order; and thus the costs are awarded to the plaintiff, and with his assent.

The general authorities on the subject appear fully to warrant the construction which we have thought ourselves called upon to put on the statute. An early case was cited by Mr. *Badeley*,—Alderman Backwell's case. One of the questions there raised before Lord Keeper NORTH, was, whether a commission of bankrupt could be denied by the Lord Chancellor, or whether it was *de jure*: and the Lord Keeper said:(a) "I hold that the commission is *de jure*, and the statute which saith that the Chancellor *may* grant, &c., is as if it had been 'shall *grant,' or 'ought to grant,' but he cannot grant *ex officio*, but on request of persons interested." And he added(b) that it had [*773 been so resolved by all the judges. This case has been followed by others,—the last of them being, *The Queen v. The Tithe Commissioners for England and Wales, In the Matter of Great Hale Tithes*, 14 Q. B. 459 (E. C. L. R. vol. 68),(c)—which, we think, support the rule, that, when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application.

For these reasons, we are of opinion, that the word "may" is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises.

But, if it be doubtful in which sense the word "may" is used, we should be justified, by the rule of construction to which we have referred, in considering whether absurdity or repugnance would not follow from holding that a discretion was given, and might accordingly modify the word so as to avoid that consequence. In our opinion, absurdity and repugnance *would* follow from such a construction. If the 11th section was intended to avoid the expense of a suggestion, that object

(a) 2 Chan. Cas. 191.

(b) 1 Vern. 153, 1 Eq. Cas. Abr. 52.

(c) "Upon the construction of the 7th section of the 5 & 6 Viet. c. 54, we are of opinion, that, in the cases to which it applies, the tithe commissioners are bound to act under it, and must conform according to its provisions. The words undoubtedly are only empowering; but it has been so often decided as to have become an axiom, that, in public statutes, words only directory, permissive, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." Per COLERIDGE, J., giving the judgment of the court.

*774] would *be effectually defeated by giving the judges a discretion under the 13th section: not only must every cause be re-tried upon affidavits, but the whole conduct of the parties, and perhaps of the witnesses, must be examined, for the purpose of enabling the judge to say whether or not the plaintiff should have his costs. A judge at nisi prius, in the exercise of the discretion expressly given to him by the 12th section, must be governed by evidence applicable to the issues joined between the parties; but a judge at chambers will be subject to no such limitation, and may be led into any inquiry which the parties may think fit to institute, without the means of enforcing the production of evidence.

This further consequence would follow from holding that the word "may" confers a discretion. Wherever the plaintiff has a cause of action for which he cannot sue in the county court, and in respect of which he has not sustained the damage necessary to give costs, his right to costs may depend, not upon his success in the action, but upon the discretion of a judge, to be exercised at chambers, and, as it is said, without control, and without the means of compelling adverse witnesses to depose to facts which may be only within their own knowledge.

If it were doubtful whether the word "may" was used to give a discretion, or to confer an authority, we should not hesitate to adopt the latter meaning, to avoid the consequences which we have pointed out.

We are aware that this decision conflicts with two cases which have been decided by the Court of Exchequer, and to which reference has been made. We regret that we are compelled, after full consideration, to arrive at this conclusion.

The case of *Latham v. Spedding*, in the Queen's Bench, does not touch the question; for, that was decided, not upon the words of the statute, but upon the *ground that the plea of "not possessed"
 *775] did not, as was erroneously supposed, put in issue the question of title only. Rule absolute.(a)

(a) See the 15 & 16 Vict. c. 54, s. 4, which repeals s. 13 of the 13 & 14 Vict. c. 61, and substitutes a new provision in lieu thereof.

It is a general rule, in the construction of statutes, that "may" means "must" where the legislature mean to impose a positive duty: *Minor v. Mechanics' Bank of Alexandria*, 1 Peters, 64; *Ex parte Simonton*, 9 Porter, 390; *Schuyler Co. v. Mercer Co.*, 4 Gilman, 20.

THE EAST ANGLIAN RAILWAYS COMPANY v. THE EAST
ERN COUNTIES RAILWAY COMPANY. Dec. 5.

A railway company incorporated by act of parliament, cannot, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion of its funds to purposes foreign from those for which it is incorporated.

The defendants were incorporated by an act of parliament, the 1st section of which enacted that certain persons should be united into a company for making and maintaining a certain railway and other works by the act authorized, according to the provisions and regulations therein-after mentioned, and *for that purpose* should be one body corporate by the name and style of "The Eastern Counties Railway Company," and should have perpetual succession, and a common seal. The 3d section empowered the company to raise a sum of money "for making and maintaining the said railway, and other works authorized by the act." The 5th section directed that the money so raised should be expended in and towards making and maintaining the said railway and other works, and in otherwise carrying the act into execution. And by subsequent sections it was provided that the profits, after defraying the expenses of making, maintaining, and working the railway, were to be accounted for and divided amongst the proprietors of the undertaking:—

Held, that it was not competent to the directors to enter into a contract with another railway company, to take a lease of their line, and to pay the costs incurred by them in the soliciting and promoting of bills in parliament for the extension and improvement of such other line of railway,—even though such extension and improvement would benefit their own company; and that such contract, if entered into, was illegal and void, and could not be enforced in a court of law.

COVENANT. The declaration stated, that theretofore, and before the making of the indenture thereafter mentioned, and before the commencement of the suit, a certain bill for the construction of certain extensions, branches, and other works therein mentioned to be thereby authorized to be constructed, to wit, a bill intituled "A bill to enable The Lynn and Ely Railway Company to extend their railway to Bury St. Edmunds," had been and was prepared by and on behalf of The Lynn and Ely Railway Company, and had been and was introduced, by, and upon the petition of, the said last-mentioned company, into parliament, and into the House *of Commons, and at the time of the making of the said indenture was pending in parliament and in the said House of Commons, and the said Lynn and Ely Railway Company were the promoters thereof: That theretofore, and before the making of the said indenture, and before the commencement of the suit, a certain other bill for the construction of certain extensions, branches, and other works therein mentioned to be thereby authorized to be constructed, to wit, a bill intituled "A bill to enable The Lynn and Ely Railway Company to extend their railway to Spalding and Holbeach," had been and was prepared by and on behalf of the said Lynn and Ely Railway Company, and had been and was introduced, by, and upon the petition of, the said last-mentioned company, into parliament and into the House of Commons, and, at the time of the making of the said indenture, was pending in parliament and in the said House of Commons, and the said Lynn and Ely Railway Company were the promoters thereof: That theretofore, and before the making of the said indenture, and before the commencement of the suit, a certain other bill for the construction of certain extensions, branches,

and other works therein mentioned to be thereby authorized to be constructed, to wit, a bill intituled "A bill for making deviation in the line of The Lynn and Ely Railway Company, and for forming docks within the borough of King's Lynn," had been and was prepared by and on behalf of the said Lynn and Ely Railway Company, and had been and was introduced, by, and upon the petition of, the said last-mentioned company, into parliament and into the House of Commons, and, at the time of the making of the said indenture, was pending in parliament and in the said House of Commons, and the said Lynn and Ely Railway Company were the promoters thereof: That theretofore, and before the making of the said indenture, and before the commencement of the suit, a certain other bill for the

*777] *construction of certain extensions, branches, and other works therein mentioned, and thereby authorized to be constructed, to wit, a bill intituled "A bill to enable The Lynn and Ely Railway Company to make a navigation from Lynn to Wormegay, all in the county of Norfolk," had been and was prepared by and on behalf of the said Lynn and Ely Railway Company, and had been and was introduced, by, and upon the petition of, the said last-mentioned company, into parliament and into the House of Commons, and, at the time of the making of the said indenture, was pending in parliament and in the said House of Commons, and the said Lynn and Ely Railway Company were the promoters thereof: That afterwards, and before the commencement of the suit, to wit, on the 26th of February, 1847, by a certain indenture then made between the said Lynn and Ely Railway Company, The Ely and Huntingdon Railway Company, and The Lynn and Dereham Railway Company, of the one part, and the said Eastern Counties Railway Company, of the other part,—one part of which said indenture, sealed with the common seal of the said last-mentioned company, the plaintiffs brought into court, &c.,—after reciting, that the said Lynn and Ely, Ely and Huntingdon, and Lynn and Dereham railway companies had agreed to amalgamate and form one company, under the name or style of "The East Anglian Railways Company," and that a bill was then pending in parliament to give effect to such agreement; and also that the said Lynn and Ely, Ely and Huntingdon, and Lynn and Dereham railway companies had agreed with the said Eastern Counties Railway Company to grant to the said Eastern Counties Railway Company a lease of their several railways, branch railways, and works, for the term and in manner thereafter mentioned,—each of them the said Lynn and Ely, Ely and Huntingdon, and Lynn and Dereham railway companies,

*778] for themselves respectively, and for their *respective successors and assigns, and so far as the several covenants, clauses, and agreements thereafter contained were or ought to be observed and performed by and on behalf of the said last-mentioned companies respectively, and their successors and assigns, did covenant and agree with the

said Eastern Counties Railway Company, their successors and assigns; and the said Eastern Counties Railway Company, for themselves, their successors and assigns, and so far as the several covenants, clauses, and agreements thereafter contained were or ought to be observed and performed by and on the part of the said Eastern Counties Railway Company, their successors and assigns, did covenant and agree with the said Lynn and Ely, Ely and Huntingdon, and Lynn and Dereham railways companies respectively, and each of them, their respective successors and assigns, in manner following, that is to say (amongst other things), —1. that, in the said agreement, The East Anglian Railways Company should be taken and considered to mean the Lynn and Ely, Ely and Huntingdon, and Lynn and Dereham railway companies, and The East Anglian Railways should be taken to mean the railways, branch railways, and works of the said last-mentioned companies, except such portion of the proposed line of the Ely and Huntingdon Railway as lies between St. Ives and Ely, and which The East Anglian Railways Company were not to construct: 2. that the East Anglian Railways should be leased to The Eastern Counties Railway Company for the term of 999 years, at such annual rent, and subject to such conditions as were thereafter mentioned: 3. that the said term of 999 years should commence on the day when the East Anglian Railways should be certified by the commissioners of railways to be completed, and ready for opening: 4. that, for the first year of the said term, the annual rent should be of such amount as would pay a clear *annual dividend of 5*l.* per cent. on 884,397*l.* 10*s.* (which should [*779 be considered as the share-capital of the East Anglian Railways Company), and for the residue of the said term the annual rent should be of such amount as would pay a clear annual dividend on such capital less by 2*l.* per cent. than the dividend for the time being payable on the entire share-capital of the said Eastern Counties Railway Company (now converted into 20*l.* shares); but the said Eastern Counties Railway Company should guaranty, that, after the expiration of the said first year, such annual rent should in no case be of less amount than would pay a clear annual dividend of 6*l.* per cent. on the said share-capital of the said East Anglian Railways Company: 6. that such annual rent should be paid to the said East Anglian Railways Company half-yearly, on, &c.: 12. that the said Eastern Counties Railway Company should find and provide all such further sums of money, over and above the said share-capital of 884,397*l.* 10*s.*, and such borrowed moneys as aforesaid, as might be necessary for completing the said East Anglian Railways, to such extent, and in such manner, as the said Eastern Counties Railway Company should fix and determine upon: 15. that the East Anglian Railways Company, or any of the companies constituting the same, should proceed with all such bills as had been introduced by them, and were then pending in parliament, for the con-

struction of extensions, branches, or other works; and, in case such bills, or any of them, should pass into a law, the said East Anglian Railways Company should proceed to execute the extensions, branches, and other works thereby authorized to be constructed; and such extensions, branches, and other works, when completed, should be transferred to the said Eastern Counties Railway Company: 16. that the said Eastern Counties Railway Company should find the capital necessary for constructing such extensions, *branches, and other *780] works, and should also pay to the said East Anglian Railways Company all the costs, charges, and expenses paid, sustained, or incurred by them in preparing or promoting the said bills so pending as aforesaid (and that whether such bills, or any of them, should pass into a law, or not), and preliminary and incidental thereto; and also all costs, charges, and expenses attending or incidental to the construction of such extensions, branches, and other works; and the respective certificates of the chairmen of the three companies constituting the said East Anglian Railways Company, of the amount of all and every such costs, charges, and expenses, should be binding on the Eastern Counties Railway Company: 17. that notwithstanding the provisions contained in the two last clauses thereof, the Eastern Counties Railway Company should have the power of staying all proceedings in relation to the said bills, or any of them, whenever they should think fit. 24. that all necessary and proper deeds for carrying the said agreement into full effect, should be prepared by some eminent, impartial conveyancer, and the common seals of the respective companies should be affixed thereto; and that such deeds should contain all usual and proper clauses, provisos, and covenants, and particularly clauses providing for the proper and efficient working of the said East Anglian Railways, and a general arbitration clause, for the purpose of settling all matters in difference between the respective companies, without having recourse to any court of law or equity, except to enforce the award made on arbitration. The declaration then went on to allege, that the said bill firstly thereinbefore mentioned, to wit, the said bill intituled "A bill to enable The Lynn and Ely Railway Company to extend their railway to Bury St. Edmunds," was one of the said bills in the said indenture mentioned to have been introduced into, and to be then pending in, parliament, as *781] *therein mentioned; that, after the making of the indenture, and before the commencement of the suit, to wit, on the 2d of March, 1847, and for a long space of time thereafter, to wit, one calendar month during the session of parliament in the said indenture mentioned, and until the said bill firstly thereinbefore mentioned was lost, as thereafter mentioned, the said Lynn and Ely Railway Company, in pursuance of the said indenture, and of the covenant in that behalf on their part therein contained, and in manner and form therein mentioned, did promote and proceed with, and cause to be promoted and

proceeded with, the same bill in parliament, by causing the same bill to be, and the same was, read a first time in the said House of Commons, and also a second time in the said House of Commons, and by further causing the same bill to be, and the same was, by the said house, committed and referred to a committee of the said house; that afterwards, and before the commencement of the suit, to wit, on the 23d of March, 1847, the said committee found, resolved, and declared that the preamble of the said last-mentioned bill was not proved, and the said bill was consequently lost without and not by reason of any default of the said Lynn and Ely Railway Company, or of the plaintiffs; and that the said Lynn and Ely Railway Company paid, sustained, and incurred certain moneys, costs, charges, and expenses, in the preparing and promoting, and preliminary and incidental to, the said last-mentioned bill, which said moneys, costs, charges, and expenses amounted in the whole, to wit, to 2000*l*. The declaration then proceeded to state that the bill secondly thereinbefore mentioned, intituled "A bill to enable the Lynn and Ely Railway Company, to extend their railway to Spalding and Holbeach," was prosecuted and proceeded with by the Lynn and Ely Railway Company, until afterwards, to wit, on the 6th of April, 1847, the defendants, in pursuance of the power *in that behalf reserved to them by the said indenture, directed and requested the Lynn and Ely Railway Company to stay all further proceedings in relation to that bill, whereupon the same was not further promoted or proceeded with; and, that The Lynn and Ely Railway Company sustained in relation thereto costs and expenses to the amount of 10,000*l*.: That the bill thirdly thereinbefore mentioned, intituled "A bill for making deviation in the line of The Lynn and Ely Railway, and for forming docks within the borough of King's Lynn," was, after the making of the said indenture, and before the commencement of the suit, duly prosecuted, and on the 9th of July, 1847, was passed into and became an act of parliament; and that The Lynn and Ely Railway Company incurred, in the prosecution and promotion thereof, costs and expenses to the amount of 10,000*l*.: That the bill fourthly thereinbefore mentioned, intituled "A bill to enable The Lynn and Ely Railway Company to make a navigation from Lynn to Wormegay, all in the county of Norfolk," was duly prosecuted by the said Lynn and Ely Railway Company, and was, on the 9th of July, 1847, passed into, and became, an act of parliament; and that The Lynn and Ely Railway Company sustained costs and expenses in the prosecution and promotion thereof to the amount of 10,000*l*.: That afterwards, and after the commencement of the suit, to wit, on the 9th of August, 1847, it was proved to, and certified by, the commissioners of railways, that one-half of the capital by the act and acts relating to each of them the said Lynn and Ely Railway Company, the said Lynn and Dereham Railway Company, and the said Ely and Huntingdon Railway Company, authorized to be raised, had been paid

up and expended for the purposes authorized by such act and acts respectively; and that thereupon "The East Anglian Railways Act, 1847," and the several provisions therein contained, took effect, and
 *783] *became, and continued, in full operation: That the total amount of all and singular moneys, costs, &c., paid, sustained, and incurred, by The Lynn and Ely Railway Company in preparing and promoting the said four several thereinbefore-mentioned bills respectively, and preliminary and incidental thereto, was 21,184*l.* 16*s.* 2*d.*; and that afterwards, and after the said moneys, costs, &c., had been so paid, sustained, and incurred as aforesaid, and before the commencement of the suit, to wit, on the 1st of January, 1850, there was, duly, and in all respects according to the terms of the said indenture, made and issued, to wit, by the chairman of the said Lynn and Ely Railway Company, the said Lynn and Dereham Railway Company, and the said Ely and Huntingdon Railway Company, respectively, a certain certificate, as required by the said indenture, of the amount of all and every such moneys, costs, &c., whereby it was certified that the said last-mentioned moneys, costs, &c., amounted, to wit, to 21,184*l.* 16*s.* 2*d.*; and that, although afterwards, and after the making and issuing of the said certificate, to wit, on, &c., the defendants had due notice of the said making and issuing of the said certificate, and of the amount therein certified as aforesaid, and although a reasonable time after such notice for the payment of the said last-mentioned amount had elapsed before the commencement of the suit; yet the defendants, at the date and time at which the said East Anglian Railways Act, 1847, took effect and came into operation, had not paid to the said Lynn and Ely Railway Company, nor had they since paid to the plaintiffs, the said last-mentioned sum of money, or any part thereof, &c.

The defendants craved oyer of "the said indenture" in the declaration mentioned, and, after setting it out, pleaded,—That, at the commencement of this suit, no act of parliament had been procured or obtained, nor was there in force any act of parliament, whereby the
 *784] *said East Anglian Railways Company, or the said Lynn and Ely Railway Company, or the said Ely and Huntingdon Railway Company, or the said Lynn and Dereham Railway Company, were or was authorized or empowered to grant any lease of their said railways respectively, or of either or any part of such railways, to the said Eastern Counties Railway Company; and that, before and at the time of the committing of the said alleged breaches of covenant, and each of them, the said Lynn and Ely Railway Company, the said Ely and Huntingdon Railway Company, and the said Lynn and Dereham Railway Company, and the said Eastern Counties Railway Company, and each of those companies, had been and were unable to procure or obtain any act of parliament authorizing or empowering the granting of such lease as in the said indenture mentioned, or of any lease of the rail-

ways of the said three first-mentioned companies respectively, or of any part thereof, to the said Eastern Counties Railway Company; that the said three companies respectively had then, and had ever since wholly abandoned all intention of procuring or obtaining any act of parliament authorizing the leasing of the said railways respectively, or of any part thereof respectively, to the said Eastern Counties Railway Company; and that divers persons, to wit, J. A., E. R. T., &c., &c., who at the time of the making and executing of the said indenture were shareholders of and in the said Eastern Counties Railway Company, and entitled to vote at general meetings of the said company, did not assent to the making or executing of the said indenture, or of the agreement therein set forth and contained,—verification.

To this plea the plaintiffs demurred generally. The points marked in the margin were as follows:—"The plaintiffs intend to argue, that, supposing the facts set out in the plea to be true, the plea affords no answer in law to the declaration; for, that it was within the [*785] *competence of the companies to agree for a lease to one of them, of the line of railways of the other of them; and that, whether it were so or not, the right of the plaintiffs to recover the costs and expenses sought to be recovered, is not thereby affected, as the covenant to pay them is an independent covenant, and not contingent upon the right to lease, or upon the leasing, of the plaintiffs' railways; and that the deed did not require the assent of the individual shareholders named."

Bramwell (with whom was *T. Wheeler*), in support of the demurrer. —Two points will present themselves for the consideration of the court, —first, whether the contract for the breach of which this action is brought, was a legal contract, and one which it was competent to the plaintiffs and defendants respectively to enter into,—secondly, whether, assuming that there is no illegality in the contract, the defendants can escape from the performance of it, because certain of the shareholders in their company did not assent to its execution.

2. The argument on behalf of the defendants, as to the second point, resolves itself into this,—that, by reason of the non-assent of some of its members or shareholders, the deed is not the deed of The Eastern Counties Railway Company. This objection, it is submitted, is not open to the defendants. The declaration alleges that the defendants, by a certain indenture made between the plaintiffs and the defendants, sealed with the common seal of the defendants, covenanted, &c. The defendants craveoyer of "the said indenture in the declaration mentioned:" they do not exercise the common caution usually observed in pleading, when it is intended to deny the deed, of calling it "the said *supposed* indenture;" and throughout the plea the document is referred to as "the said indenture,"—admitting it to be their deed. [MAULE, [*786] J.—It is no admission at all.] There *is this additional reason

why this defence should not be open to the defendants. It is meant to be said that this deed was *ultra vires* the directors. How does that appear upon these pleadings? The Eastern Counties Railway Company is a company constituted by acts of parliament, of which the court will take notice. These acts are framed with two views,—the one, the regulation of the rights and duties of the company as between them and the public,—the other, the regulation of the private rights of the shareholders or members of the company *inter se*. It is perfectly competent to the company to modify their rights by any collateral agreement which is not inconsistent with the acts of parliament. Now, there is nothing inconsistent with the acts, to suppose that the company may have previously agreed amongst themselves that such a deed as this should not be avoided by the want of assent of some of their body: and it is not alleged that the plaintiffs had notice that this was *ultra vires*. [MAULE, J.—The plea is not demurred to specially, on the ground that it amounts to *non est factum*.] No: the general demurrer was the result of an arrangement between the parties.

1. The directors have entered into this contract under the common seal of the company. If a contract thus entered into can be avoided upon the ground here suggested, there is hardly any contract which a railway or other joint-stock company can enter into which would be binding upon them. *Smith v. The Hull Glass Company*, 8 C. B. 660 (E. C. L. R. vol. 65),—where it was held, that, in an action brought against a joint-stock company completely registered under the 7 & 8 Vict. c. 110, for goods ordered by persons in their employ, and supplied for the purposes of the company, and used by them in their works, it is not necessary for the plaintiff to prove that the persons who *787] gave the orders were authorized by the directors so to do, or that the contract was made pursuant to the provisions of the company's deed of settlement and by-laws,—is to some extent an authority for the plaintiffs. [JERVIS, C. J.—The Court of Exchequer, in *Ridley v. The Plymouth, &c., Grinding and Baking Company*, 2 Exch. 711,† had taken a different view of the question; and the matter is now pending in this court upon a special verdict.(a)] This, how-

(a) In *Smith v. The Hull Glass Company*, since reported, 21 Law Journ., N. S., C. P. 106, and post. There, it appeared by the special verdict, that the defendants were a joint-stock company completely registered under the 7 & 8 Vict. c. 110, and were employed in the manufacture of glass, having a manager, appointed under a clause in its deed of settlement, to superintend and transact its manufacturing business; that the general business was to be transacted by a board of directors, who had power to appoint officers and delegate their authority: and that the manager, the chairman of the directors, the deputy-chairman, and the secretary, respectively, ordered goods necessary for the manufacture, which were delivered on the company's premises, and used for the company's purposes; and it was held, that, without any delegation, the manager had authority to give such orders, in the absence of any express provisions to the contrary; and that, although the other officers had no authority to give such orders, and although there was no express recognition or adoption of their orders by the directors, the directors must be taken to have known that the goods had been furnished and used, and that therefore the company was liable to pay for them.

over, is the case of a deed under the common seal of the company. [WILLIAMS, J., referred to *Clarke v. The Imperial Gas Light Company*, 4 B. & Ad. 315 (E. C. L. R. vol. 24), 1 N. & M. 206 (E. C. L. R. vol. 28), where Lord DENMAN intimated an opinion that a contract which had not been entered into with the formalities prescribed by the company's act of incorporation, could not be enforced against them.] *Hill v. The Manchester and Salford Water-Works Company*, 2 B. & Ad. 544 (E. C. L. R. vol. 22), is a much stronger case than the present: it was there held, that, where a company authorized by act of *parliament to raise money for certain purposes, has given a bond [*788 purporting to be for a sum borrowed and advanced conformably to the act, it is not sufficient for them to plead to an action on such bond, that it was executed colourably, and that the money was not in fact borrowed or lent for the purposes of the statute, as the obligee well knew,—the pleas not disclosing any fraud, or any injury done to the shareholders. Lord TENTERDEN there said: “I am not prepared to say that the company might not have been liable upon these bonds, even if they had been given without any view to the purposes expressed by the act; but the pleas do not raise that question. If the defendants meant to insist that the bonds were given for purposes unsanctioned by the act, and also prejudicial to the shareholders and mortgagees, that ought to have been shown.” In a subsequent action between the same parties, (a) on a bond the condition of which recited that the company were by act of parliament authorized to raise money by bond, and that, at a general meeting of the company of proprietors, it had been resolved that the bond in question should be issued for that purpose, the defendants pleaded *non est factum*; and it was held,—first, that, although the company could not, under that plea, show that the bond executed by them was invalidated by collateral matters, they might show that it was void because executed contrary to the provisions of the act of parliament,—secondly, that a clause in the act of parliament whereby the company were authorized, at any general or special general assembly, to order and dispose of the custody of their common seal, and the use and application thereof, empowered them to make rules and regulations for its custody, but did not require concurrence in each particular act of sealing; and that a bond to which a seal had been *affixed by the company's clerk, under a general authority from [*789 the directors, was valid. Tha' case is an authority to show, that, if the common seal of the company is affixed to a document with all the formalities, and under all the circumstances which would make the instrument valid if it were not *ultra vires*, its being *ultra vires* is wholly immaterial. [JERVIS, C. J., referred to *Bosanquet v. Shortridge*, 4 Exch. 699,† where a shareholder in a joint-stock bank, who had ceased in fact to be a shareholder, but had not in retiring observed the formalities pre-

(a) 5 B. & Ad. 866 (E. C. L. R. vol. 27), 2 N. & M. 573 (E. C. L. R. vol. 28).

scribed by the deed of settlement, was held to continue liable for the debts of the copartnership.] There, the party had entered into a contract by which he became a partner in the concern; and from that contract he could only release himself by observing the formalities which he himself had agreed to observe,—the condition upon which alone he was to cease to be a partner had never happened. [JERVIS, C. J.—The defendant was bound to know the contents of a deed to which he was a party. Were not the plaintiffs here bound to know the contents of the acts of parliament?] Suppose this were not the case of a public act. [JERVIS, C. J.—Why suppose that which is untrue?] Suppose the case of a company existing under a deed of settlement which requires the observance of certain preliminaries before the common seal of the company can be affixed to any instrument,—would the non-observance of one of those preliminaries afford a defence on *non est factum*? If not, does it make any difference that the regulations are contained in an act of parliament? In both cases, the question is the same,—had the directors authority to do the act? [MAULE, J.—There is a considerable difference between the preliminaries or conditions upon which the directors

*790] shall be authorized to contract, and the mode of *procedure in contracting. Suppose the act provides that money shall not be borrowed, except for certain specific purposes; and, further, that no deed shall be binding upon the company, unless the common seal be affixed thereto in the presence of three directors. I can understand that it might be reasonable to allow the company to say that this latter condition had not been complied with, inasmuch as, it being a formality required by an act of parliament, the other party was bound to see that it had been duly observed: but that is a very different thing from requiring him to see to the application of the money.] Assuming this indenture to have been executed in perfect compliance with all the formalities prescribed by the statute, is it competent to the defendants to say, this is not our deed, because we never authorized the directors to make the contract which they have assumed to enter into. Mr. Baron ROLFE, in delivering the judgment of the court, in the case of *The Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 814, ¶23,† makes some remarks which well deserve attention. He says: “Before dismissing this case, we feel ourselves called upon to say, that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then undoubtedly, the adding a seal would be matter purely of form, and not

of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by *such an act; and persons dealing with the corporation know, [*791 that by such an act, *the body will be bound*. But, in other cases, *the seal is the only authentic evidence of what the corporation has done, or agreed to do*. The resolution of a meeting, however numerous attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity of a seal, as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, *which by law shall be taken as conclusively evidencing the sense of the whole body corporate*, is a necessity inherent to the very nature of a corporation: and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience." In Roll. Abr. *Faits* (K), it is said: "The deed of a corporation does not require delivery, but the affixing of the common seal gives perfection to it." And, in Com. Dig. *Franchises* (F 11), it is said: "An act by the major part corporately assembled, is the act of the whole corporation, if assembled in a convenient place, though not in the chapter-house." Where there is no particular restriction as to the mode of affixing the common seal, and authority is given to certain persons to affix it, the contract being sealed, and being a contract in itself not illegal, the company cannot be allowed to say that it is not their deed, because certain of the shareholders were not assenting parties to the contract. If that be a thing to be complained of at all, it can only be in a court of equity, charging the directors with a breach of trust. There is nothing in any of the acts of parliament for the regulation of 'The Eastern Counties Railway, or in the plaintiffs' acts, which prohibits or restrains the one from taking or the other from *granting a lease [*792 of their lines of railway. [MAULE, J.—It may be that the defendants, in taking this lease, may be usurping a larger franchise than their acts of parliament warrant: they may be encroaching; and yet it may not be competent to them to allege their own encroachment. If the directors make contracts which are in breach of their engagements with their own shareholders, they do an illegal thing; but it does not therefore follow that such contracts are void as against strangers, without notice.] Here is a contract under the common seal of the company: how can the court, upon these pleadings, see that it is a contract which the defendants could not legally enter into? [MAULE, J.—The company being incorporated for a particular purpose, and for a particular purpose only, can we upon this declaration see that the contract was one which they could legally enter into? JERVIS, C. J.—If it is not within the purpose for which the company

was incorporated, it is no contract at all.] How does it appear that this contract is not ancillary to the very purpose for which the defendants were incorporated? In *Pallister v. The Mayor, &c., of Gravesend*, 19 Law Journ., N. S., C. P. 358, it was held that a bond given after the 5 & 6 W. 4, c. 76, and before the 6 & 7 W. 4, c. 104, and the 7 W. 4 & 1 Vict. c. 78, by a municipal corporation, for money borrowed, is good at law, although under the 92d section of the first act it could not be enforced against the borough fund. [MAULE, J.—The defendants' act of incorporation, 6 & 7 W. 4, c. cvi., does not first incorporate them, and then restrict them as to what it shall be lawful for them to do; but it, in s. 1, enacts that certain persons who are named, "shall be and are hereby united into a company *for making and maintaining the said railway* and other works by this act authorized, and *793] for other the purposes herein declared, according to the *provisions and regulations hereinafter mentioned, and *for that purpose*,"—putting it in the very *viscera* of the clause,—“shall be one body corporate, by the name and style of The Eastern Counties Railway Company.” But it may be, that, supposing the company to take a lease of a chapel or a theatre, we could not, without the aid of an express averment to that effect, know that it was not for the purposes of the railway.] If this is a plea of illegality, it ought to have been so pleaded in terms: illegality is not to be assumed: *Lewis v. Davidson*, 4 M. & W. 654.† At all events, that part of the contract by which the defendants bind themselves to pay the expenses incurred by the plaintiffs in promoting the four bills mentioned in the introductory part of the declaration, is not illegal; nor can it be affected by the illegality of the rest of the contract: *Price v. Green*. 16 M. & W. 346.†

Sir *Fitzroy Kelly* (with whom were *Crowder* and *Bovill*), contra.—The deed upon which this action is founded, is entered into for a purpose that is illegal and in express violation of the terms and provisions of the act of parliament under which the defendants were incorporated. The Eastern Counties Railway Company is incorporated(a) for the purpose of making a railway from London to Norwich and Yarmouth, and for that purpose only. The three other companies mentioned on this record are also incorporated under several acts of parliament for the purpose of making and maintaining their several railways,—one, from Lynn to Dereham(b)—another from Lynn to Ely,(c)—and the third, from Ely to Huntingdon.(d) These three last-mentioned companies *794] were by a subsequent act(e) incorporated into *one company, under the name of The East Anglian Railways Company. Before the act by which they were thus consolidated and united, The Lynn and

(a) By 6 & 7 W. 4, c. cvi.

(c) 8 & 9 Vict. c. lv.

(e) 10 & 11 Vict. c. cclxxv.

(b) 8 & 9 Vict. c. cxxv.

(d) 8 & 9 Vict. c. xlviii.

Ely Railway Company, The Ely and Huntingdon Railway Company, and The Lynn and Dereham Railway Company, entered into the contract in question with the defendants. By that contract, the defendants,—who are incorporated for the sole purpose of making and maintaining a railway from London to Norwich and Yarmouth, having no power, by act of parliament or otherwise, to exercise any functions whatever in relation to any other railway,—undertook to accept, and the other three companies undertook to grant, a lease for 999 years of their united railways. The agreement further stipulates that parliament shall be applied to to give effect to the contract, and to enable the one company to grant and the other to take the proposed lease: and then come the further stipulations, which are incidental to the main stipulation, viz., the grant of the lease, as to the promoting the bills in parliament for certain proposed advantages to the three companies, and providing for the payment of the costs of obtaining acts of parliament. Two of these bills, viz., “A bill for making deviation in the line of The Lynn and Ely Railway Company,”(a) and “A bill to enable The Lynn and Ely Railway Company to make a navigation from Lynn to Wormegay,”(b) passed,—one, viz., “A bill to enable The Lynn and Ely Railway Company to extend their railway to Bury St. Edmunds,” was thrown out,—and the other, viz., “A bill to enable The Lynn and Ely Railway Company to extend their railway to Spalding and Holbeach,” was abandoned at the request of the defendants. The costs of promoting these bills, amounting to a sum of 21,184*l.* 16*s.* 2*d.*, the plaintiffs now seek to recover from the defendants. The plea, after *setting out the deed upon oyer, states, that at the commence- [*795 ment of this action, no act of parliament had been obtained to enable the defendants, or the three companies of which their body was composed, to lease their railways; that they had been unable to obtain any act of parliament for that purpose; and that they had abandoned all intention of obtaining one: and then the plea very unnecessarily goes on to allege that certain shareholders of The Eastern Counties Railway Company did not assent to the making or executing of the indenture. The plain and conclusive ground of resistance to this action, is, that it is founded upon a contract by The Eastern Counties Railway Company, to apply the funds raised under the powers and for the purposes of their act of parliament, to purposes which, upon the face of the contract, manifestly appear to be altogether out of the scope of the act of parliament upon which alone their authority rests. The Eastern Counties Railway Company’s act of incorporation, 6 & 7 W. 4, c. cvi., which is a public act, prescribes the only description of contracts which the company can enter into, and the mode of expenditure of the funds raised under it: the plaintiffs, therefore, have entered into a contract which they knew to be illegal. The company are incorporated for

(a) 10 & 11 Vict. c. clxx.

(b) 10 & 11 Vict. c. clxxi.

making and maintaining a railway from London to Norwich and Yarmouth, and for that purpose only. By s. 3, the company are empowered "to raise amongst themselves any sum of money *for making and maintaining the said railway* and other works by this act authorized, not exceeding in the whole 1,600,000*l.* The 5th section prescribes the manner in which the money to be raised under the act shall be laid out: it enacts "that the money to be raised by the said company by virtue of this act, shall be laid out and applied, in the first place, in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing this act, and all other expenses preparatory *796] *or relating thereto,*" and the remainder in, for, and towards purchasing lands and making and maintaining the said railway and other works, and in otherwise carrying the act into execution. [MAULE, J.—That restriction does not apply to profits.] The application of these is provided for by the 171st section, which relates to the making of dividends, much in the same terms as the 122d section of the companies clauses consolidation act, 8 Vict. c. 16. Then, further power is given to the company by the 246th and 247th sections to raise an additional 600,000*l.* by mortgage, if necessary, "for the making, completing, and maintaining of the said railway and other works by this act authorized to be made, and for defraying all necessary charges and expenses relating thereto." Wherever an act of parliament provides that the funds to be raised under it shall be applied in a given way, they *must* be applied in that way, and in no other way. [MAULE, J.—Particularly where there is a residuary provision.] Now, the plaintiffs by this action seek to enforce the application of 21,184*l.* 16*s.* 2*d.* of the money raised under the authority and for the purposes of this act, for a purpose totally unconnected with that authority and those purposes, viz. for the promotion of four several bills in parliament brought in by another railway company, and for their sole benefit. [MAULE, J.—How does that appear upon this record? We have not the terms of the bills before us.] If those bills had been solicited by the defendants themselves, it would still be a misapplication of the funds raised under their act. But it is not necessary to resort to that argument; for, this is a contract by one company to indemnify three other companies against the expenses to be incurred in soliciting bills for the exclusive benefit of the latter,—for obtaining extensions and improvements of their respective lines. The court will take notice that bills having reference to the improvement of rail- *797] ways *from Lynn to Dereham, from Lynn to Ely, and from Ely to Huntingdon,* cannot be for the benefit of The Eastern Counties Railway Company. [JERVIS, C. J.—How can we assume that? The bills in question might have contained clauses beneficial to The Eastern Counties Railway Company, with reference to the powers and provisions of their act. The Eastern Counties Railway Company have a branch to Ely.] It is possible that some contingent and collateral advantages

might accrue to the defendants from those bills: but, even if that were so, the contract would still be illegal. [MAULE, J.—We all know that railways sometimes take directions which, having regard to our geographical knowledge only, we should consider very unlikely, in consequence of what are called “engineering difficulties.”] It is not alleged that the bills were brought in at the request of the defendants, or that either of them contained any provisions which could enure to their benefit, or that the contract itself was entered into for any purpose connected with the undertaking already authorized by the Eastern Counties Railway act. But it *does* appear that the inducement to the entering into this contract was, the prior and paramount stipulation that these three railways, constituting as they were then about to constitute, and as they do now constitute, The East Anglian Railways, were to be leased to The Eastern Counties Railway for 999 years. It is submitted that a contract of that nature, entered into by a company incorporated for one specific purpose only, and bound to apply its funds to that purpose exclusively, is void. Each shareholder has a right to repose in peace upon the purposes mentioned in the act of parliament, upon the faith and confidence of which he has invested his money: the directors have no right to impose upon him a speculation which is *dehors* the purposes mentioned in the act. In *Broughton v. The Manchester and Salford Water Works *Company*, 3 B. & Ald. 1 (E. C. L. R. vol. 5), the defendants, a company not established for trading purposes, being [*798 sued on a bill of exchange, defended themselves on the ground that it was not competent to them to accept a bill of exchange, that being in contravention of the acts relating to the Bank of England; and this was held to be good defence. And HOLROYD, J., said: “I take it to be clear, that, where a statute prohibits a thing to be done, and does not expressly avoid the securities which fall within the prohibition, there, if the violation of the law does not appear on the face of the instrument, and the party taking it is ignorant that it was made in contravention of the statute, it is an available security in the hands of such a person, I think, therefore, that, as the statute here does not expressly avoid the security, the bill of exchange, under the circumstances stated in *Wigan v. Fowler*, 1 Stark. N. P. C. 459 (E. C. L. R. vol. 2), would not be void in the hands of an innocent holder. But, here the defendants are made a corporation by a public act of parliament, and every person is bound to take notice of that act; and when, therefore, a holder of a bill, though a *bond fide* endorsee, takes the defendants’ acceptance, he must know that they are a body corporate; and he therefore receives it, knowing it to be the acceptance of a corporation prohibited from owing money on such a bill: he is not, therefore, an innocent endorsee, because he takes a bill which he knows to be prohibited by statute; and that distinguishes the case from the case of *Wigan v. Fowler*.” That is the ground upon which the cases one and all have proceeded.

We may assume, therefore, that, where a statute makes a contract illegal, it is notice to all the world, and all are bound by the illegality of the transaction. It is idle to say that the shareholders in such a case may have relief in equity. It is only by treating the contract itself as illegal and void, and incapable of being enforced, that the

*799] *shareholders, or the public, can be protected from excesses in the exercise of their powers by the directors. One of the earliest cases in equity upon this subject, was that of *Colman v. The Eastern Counties Railway Company*, 10 Beavan, 1, where the directors of the company who are the defendants in this action, for the purpose of encouraging the traffic on their railway, proposed to guaranty certain profits and secure the capital of an intended steam-packet company, who were to run steam-vessels from the port of Harwich, in connexion with the railway; and it was held that such a transaction was not within the scope of their authority; and they were restrained from carrying the bargain into effect. Lord LANGDALE, M. R., lays down the rule in a manner that is quite decisive of the present case. "I think it right to observe," he says, "that companies of this kind, possessing most extensive powers, have so recently been introduced into this country, that neither the legislature nor courts of justice have been able to understand all the different lights in which their transactions ought properly to be viewed. We must adhere, however, to ancient general and settled principles, so far as they can be applied to great combinations and companies of this kind. Joint-stock companies have funds so extremely large, and exercise powers so extensive and so materially affecting the rights and interests of other persons, and the rights which the public or the subjects of her Majesty have been accustomed to enjoy under the protection of the laws established in this kingdom, that, to look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise, of interference, not only with the

*800] *public, but with the private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But, it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must always be carefully looked to; and I am clearly of opinion that the powers which are given by an act of parliament like that now in question, extend no further than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned." "I must, in the absence of any legal decision, say that I consider that the acqui-

escence of the shareholders in such transactions affords no ground what-
 ever for the presumption of their legality. I am far from saying that
 that which is here proposed to be done might not be profitable to this
 company, or that it might not be a public advantage. I am far from
 expressing an opinion that the establishment of a steam-packet com-
 pany at Harwich, communicating with this railway, might be not only
 of public, but of national importance, or that it might not be proper to
 give this company authority to do that which they are now attempting
 to do, as it seems to me, without authority. I mean to express no
 opinion as to this. What they are doing is this:—under the powers of
 this act of parliament, enabling them to do what is required for the con-
 struction, maintenance, and proper and convenient use of this railway,
 they are proposing to pledge the funds of this company to support the pro-
 posed Harwich Steam-Packet Company, to the extent of 150,000*l.*, or even
 300,000*l.* “It is not proposed that the railway company should directly,
 and by their own directors, engage in the steam-packet company,
 *and carry on that trade; but only that they should impose on [*801
 the railway company the whole risk and liability, not only of
 paying interest at 5*l.* per cent., but, if the transaction should turn out
 an unprofitable one, of making good to every shareholder the full
 amount which he has paid. Is there anything in this act of parliament
 sanctioning such a course of proceeding? *Do the powers to construct,*
maintain, and regulate the traffic, and to do all that is necessary for the
purpose of carrying on and working the railroad, imply that the directors
are to be at liberty to pledge the funds of the company for a completely
different transaction, in the hope that it may turn out a profitable one,
and, by being itself profitable, add to the profits of the railway company?
Surely, there is nothing in the powers given by this act of parliament
which can authorize that.” It is clear, therefore, that, in the opinion
 of that very learned person, no prospect of advantage, however prox-
 imate, or even certain, to the present defendants, from the obtaining
 the proposed acts of parliament by the other three companies, would
 justify them in imposing upon their shareholders the liability which is
 sought by this contract to be imposed upon them. His Honour further
 observes,—“I must say, that, in my opinion, to pledge the funds of
 this company for the purpose of supporting another company engaged
 in a hazardous speculation, is a thing which, according to the terms of
 this act of parliament, they have not a right to do.” A company
 established by act of parliament with limited powers, and for limited
 purposes, cannot exceed those powers, and apply the funds of the com-
 pany to any purposes other than those specified in the act. In *Salomons v. Laing*, 12 Beavan, 339, a railway company became lawfully
 possessed of shares in another independent railway company; and it
 was held, that, having *no authority to do so by their act of [*802
 parliament, they could not legally, as against one dissentient

shareholder, increase the number of their shares, or apply their funds for the support of the second company. Lord LANGDALE there says: "A railway company incorporated by act of parliament, is bound to apply all the moneys and property of the company for the purposes directed and provided for by the act, and for no other purpose whatever. Any application of or dealing with the capital, or any part of the capital, or any funds or money of the company, which comes under the control or management of the directors or governing body of the company, in any manner not distinctly authorized by the act, is in my opinion an illegal application or dealing." [MAULE, J.—Was the point made in any of these cases, that the contract was void in law?] It was. In *Bagshaw v. The Eastern Union Railway Company*, 2 M'N. & G. 389, a railway company, having power, under separate acts of parliament, to make and purchase certain branch railways in connexion with their main line, were for those purposes respectively authorized to raise the requisite capital, by the creation of new stock. Having issued scrip-certificates accordingly, but being about to apply the money subscribed in respect thereof to the prosecution of works *on their original line*, a holder of such scrip filed a bill to restrain them: and Lord COTTENHAM held that those who subscribed for the purposes specified by the acts, had a right to have their money applied to such purposes exclusively. In *Beman v. Rufford*, 15 Jurist, 914, the directors having entered into a contract, the legality of which was doubtful, to expend money in laying down rails, they were restrained, at the suit of some of the shareholders, from doing so until the validity of the contract had been decided at law. Lord CRANWORTH expressed a strong

*803] *opinion that the contract was illegal; and said: "I am clearly of opinion, on all the authorities, and all principle, that it is the province of this court to prevent such an illegal contract from being carried into effect; because, on the principle that has been so often laid down, this court will not tolerate that parties having the enormous powers which these railway companies have obtained, shall lay out one farthing of the funds out of the way in which it was provided by the legislature that they should be applied." [MAULE, J.—All these cases arose upon the application of dissentient shareholders. Where an agreement has been procured by fraud, the party defrauded may at his election treat it as void, but he must make his election within a reasonable time: *Campbell v. Fleming*, 1 Ad. & E. 40 (E. C. L. R. vol. 28), 3 N. & M. 834 (E. C. L. R. vol. 28). The party guilty of the fraud, however, has no such election.] Here, the contract is not voidable, at the election of either party: it is absolutely and incurably void. A contract may be illegal, as being in fraud of a particular individual; in that case, it is he only who can impeach it. But a contract may also be illegal because it is in contravention of an act of parliament: and, if such be the character of the illegality, the contract is absolutely void, without reference to the

election of any party. That is the case here. [MAULE, J.—If you could show a case of a bill filed for a specific performance of such a contract as this, it would be much more to the purpose.] The validity of such a contract as this came under discussion before Vice-Chancellor TURNER, in a case of *The Great Northern Railway Company v. The Eastern Counties Railway Company*. The circumstances were these:—The East Anglian Railway Company, not having obtained, and probably not desiring to obtain, any act of parliament authorizing them to perform this contract by leasing their lines to the defendants, *entered into an agreement with The Great Northern Railway Com- [*804 pany for leasing or in some way transferring them to that company; and an application was made to the Vice-Chancellor by The Great Northern Railway Company, for an injunction to restrain The Eastern Counties Railway Company from doing certain acts which they were charged with doing for the purpose of preventing that contract from being fully carried into effect, viz., obstructing the crossing of their line. And the injunction was refused, on the ground that the contract was illegal and void, as being a contract for the doing a thing which was not authorized by the acts of incorporation of The East Anglian Railways Company, or of the other companies of which that company was composed. It is contrary to public policy to permit a railway company to deal with the railway, or with the funds of the company, otherwise than in strict accordance with their acts of parliament. [MAULE, J.—The public has an obvious interest in the due application of the funds, inasmuch as their misapplication, by crippling the resources of the company, tends to prevent a reduction of fares.] In a case of *The Shrewsbury and Birmingham Railway Company v. The North Western Railway Company*, now pending in the Court of Queen's Bench, this point is raised upon a demurrer to the declaration. In *Munt v. The Shrewsbury and Chester Railway Company*, 20 Law Journ., N. S., Chan. 169, the Shrewsbury and Chester Railway Company were by various acts of parliament empowered to make several railways, and also to build wharfs and warehouses, for the purposes of the traffic of the company, on the banks of the Dee, the conservancy of which was vested in other persons: the company brought a bill into parliament, to preserve and improve the navigation of the river, though it had no power to employ any of its capital for that purpose: and, *upon a bill filed by one shareholder, it was held that the com- [*805 pany could not legally employ any of their capital in payment of the expenses of preparing, prosecuting, or promoting the bill in parliament, or for any other purpose not authorized by their acts of incorporation; and an injunction was granted, to restrain them from so doing. There, the proposed bill was obviously most closely connected with the interests of the company; and yet the application of any of their funds to the promotion of it was held to be *ultra vires*, though by no means so palpable a misapplication of the funds as that contemplated by this

contract. The Master of the Rolls (Lord LANGDALE), in the course of a very long and very able judgment, says: "I do not think that this question has ever been before the House of Lords: but, so far as the power of the Court of Chancery extends, it has unalterably decided that companies possessed of funds for objects which are distinctly defined by act of parliament, cannot be allowed to apply them to any other purpose whatever, however beneficial or advantageous it may appear either to the company or to individual members of the company." In all these cases, the sole question has been, whether or not the contract was legal. With regard to the cases cited on the part of the plaintiffs, they will all, upon examination, be found, if applicable at all, to be in reality authorities the other way. *Clarke v. The Imperial Gas-Light Company*, 4 B. & Ad. 315 (E. C. L. R. vol. 24), 1 N. & M. 206 (E. C. L. R. vol. 28), merely decided that the court would presume nothing in favour of an objection on the part of the directors, that the formalities prescribed by the act of parliament in affixing the company's seal to an instrument, had not been duly complied with. In *Hill v. The Manchester and Salford Water Works Company*, 2 B. & Ad. 544 (E. C. L. R. vol. 22), it was held, that the company could not, under *806] *non est factum*, show that a bond executed by them was invalidated by collateral matter, but they might show that it was void because executed contrary to the provisions of the act of parliament. Here, the defendants do not seek to avoid the contract by any collateral matter; but they say it is illegal and void, because contrary to the provisions of the act of parliament. In the next case between the same parties, (a) LITTLEDALE, J., says: "These pleas might have been an answer to the plaintiff's action, if they had shown that the bonds were given in consideration of some act which was immoral, or contrary to act of parliament or public policy." That is the precise defence here: this contract is contrary to act of parliament and public policy. In the notes to *The King v. Kilderly*, 1 Wms. Saund. 309 c, numerous cases are referred to in support of the position, that, "when the provisions of an act of parliament have been infringed, no contract can be enforced, arising out of the transaction." The clear ground upon which it is submitted that this action is not maintainable, is, that it is founded upon a contract by which the defendants undertook to pay certain expenses which by law they had no power to undertake to pay, and to the payment of which they had no power by law to apply any of the funds which might come to their hands under the act of parliament,—a contract which it was impossible for them to make or to perform, without exceeding the powers and violating the provisions of their act of parliament. The stipulation to pay the costs of soliciting the bills, the non-payment of which is the breach here assigned, is entirely dependent and based upon the agreement to lease. The whole is void.

(a) 5 B. & Ad. 866 (E. C. L. R. vol. 27), 2 N. & M. 573 (E. C. L. R. vol. 28).

Bramwell, in reply.—The first question is, whether, *inde- [*807
pendently of any question as to its legality as between the com-
pany and the public, this was a contract which the parties had legal
capacity to enter into. The act of parliament first constitutes the
company, and then gives them certain rights and powers, and imposes
upon them certain duties in reference to the public. It is difficult to
say that a corporation cannot bind themselves by a contract which is
ultra the scope of their authority, when it has been held that they may
be indicted for a misfeasance, in obstructing an old road without first
substituting a new one: *The Queen v. The Great North of England
Railway Company*, 9 Q. B. 315 (E. C. L. R. vol. 58). [MAULE, J.—
Whether a corporation may, after a thing has been done under the
authority of their common seal, defend themselves on the ground that
the thing done was one which they had no legal authority to do, is a
very different question from whether they can enforce an executory
contract which has been entered into without legal authority.] The
act of creating them a corporation, and giving them a common seal,
gives them all the powers that are legally incident to a corporation.
And, when a corporation intrusts a particular number of its body with
a seal, it is competent to the parties so intrusted to bind the corporation
by affixing the seal to any contract which is not contrary to law, or
expressly prohibited by the act of parliament. And there is nothing
upon this record to show that this is an illegal contract. [MAULE, J.
—The real question is, whether the company, being created a corporate
body for a specific purpose, have any power to contract beyond the
scope of that limited and special authority.] The question here is not
whether a court of equity would restrain the parties, at the instance
of a shareholder, from entering into or acting upon such a contract as
this; but whether it is *per se* illegal. Now, *the 208th section [*808
of the 6 & 7 W. 4, c. cvi., enables The Eastern Counties Rail-
way Company “from time to time to make and enter into any contract
or agreement with any other railway company (and which contract or
agreement all other railway companies are hereby empowered to make
and enter into), either for the division or apportionment of the rates,
tolls, and duties, or for the passage over or along the railway by this
act authorized to be made, of any engines, &c., of or belonging to any
other railway company, or which shall pass over or along any other line
of railway, or for the passage over or along any other line of railway,
of any engines, &c., which shall belong to the said Eastern Counties
Railway Company, or which shall pass over or along their line of rail-
way, upon the payment of such rates, tolls, or duties, and under such
conditions and restrictions as may be mutually agreed upon; and also
*to make and enter into any other contract with any other railway com-
pany, that may be deemed advisable; and every such contract may
contain such covenants, clauses, provisions, conditions, and agreements*

as the contracting parties may respectively think advisable, and mutually agree upon." [MAULE, J.—The preamble to that section shows what is meant by it: it has reference solely to the convenience of running the carriages of one company upon a portion of the line of another railway communicating with it. The very enactment shows that the legislature thought an express provision necessary to enable the companies to enter even into such contracts as that.] It might be necessary, to justify the directors, as against dissentient shareholders. [MAULE, J.—If, then, s. 208 is a mere enactment regulating the exercise of the powers of the company, you must resort to the incorporation to see what is the extent of their powers.] It is impossible to see that the purposes for which this contract was entered into are so foreign to the *809] purposes for which The Eastern *Counties Railway Company was incorporated, as to make the contract illegal.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court:—(a)

This is an action of covenant. The declaration states, that, before the contract was made, there were four railway companies, each incorporated by a separate act of parliament,—The Lynn and Ely Railway Company, The Ely and Huntingdon Railway Company, The Lynn and Dereham Railway Company, and the defendants, The Eastern Counties Railway Company; that The Lynn and Ely Railway Company had introduced into parliament, upon their own petition, four bills for purposes connected with their railway; that the three first-named companies had agreed to amalgamate and form one company under the name and style of The East Anglian Railways Company; and that a bill was then pending in parliament, to give effect to such agreement. The declaration then states that the defendants, by an indenture under their common seal, between themselves and the plaintiffs (comprehending the three first-named companies, since amalgamated by act of parliament), covenanted with the plaintiffs (amongst other things) to take a lease of their railways, upon certain terms mentioned in the indenture, and to find the capital necessary for the construction of the extensions, branches, and works authorized to be constructed by the bills then pending in parliament, and to pay the costs of preparing and promoting such bills, whether the same should pass into law or not. The declaration further states that the bills were proceeded with; that two were *810] passed; and that the costs of the bills, amounting to a *large sum, had not been paid by the defendants to the plaintiffs.

The defendants set out the indenture upon oyer, and pleaded that the plaintiffs had no authority to grant leases of their railways to the defendants; that they had been unable to obtain acts of parliament for that purpose; that they had abandoned all intention of so doing; and

(a) The demurrer was argued in the last term, before JERVIS, C. J., MAULE, J., WILLIAMS, J., and TALFOURD, J.

that several shareholders of the defendants' company (naming them) had not assented to the making or executing the indenture, or the agreement therein contained.

The plaintiffs demurred generally to this plea: and the question for the opinion of the court, is, whether, upon this record, the plaintiffs can maintain their action. We are of opinion that they cannot, and that the defendants are entitled to judgment.

The defendants are incorporated by the statute 6 & 7 W. 4, c. cvi., the first section of which enacts that certain persons shall be united into a company for making and maintaining the railway mentioned in that section, and other works by that act authorized, and for other purposes in that act declared, and for that purpose shall be one body corporate by the name and style of "The Eastern Counties Railway Company," and have perpetual succession, and a common seal.

The third section empowers the company to raise a sum of money for making and maintaining the said railway, and other works authorized by the act; and the 5th section directs the money so raised to be expended in and towards making and maintaining the said railway, and other works, and in otherwise carrying the act into execution. The money raised on mortgage is to be applied in the same way,—s. 246; and the profits of the company, after defraying the expenses of making, maintaining, and working the said railway, are to be accounted for and divided amongst the proprietors of the undertaking,—ss. 170, 171.

*This act is a public act, accessible to all, and supposed to be known to all; and the plaintiffs must, therefore, be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be. [*811

It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their act: but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profits of their own railway.

This, in truth, is the same proposition, in another form; for, if the company cannot carry on a new trade, merely because it was not contemplated by the act, they cannot embark in other undertakings not sanctioned by their act, merely because they hope the speculation may ultimately increase the profit of the shareholders. They cannot engage in a new trade, because they are a corporation only for the purpose of making and maintaining The Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object, or the

prospect of success, they are still but a corporation for the purpose only of making and maintaining The Eastern Counties Railway: and if they cannot embark in new trades, because they have only a limited authority, for the same reason they can do nothing not authorized by their act, and not within the scope of their authority.

Every proprietor, when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed; and *812] it is no sufficient answer *to a shareholder, expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary, and destined by parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was obtained, and not expressly sanctioned by the legislature.

The cases in equity which have been cited, proceeded upon this view of the subject, and were decided not because the particular act restrained by injunction was a breach of trust, but because it was not within the scope of the directors' authority, was not justified by the statute, and was therefore illegal. In *Colman v. The Eastern Counties Railway Company*, 10 Beavan, 15, the Master of the Rolls (Lord LANGDALE) says: "It has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts; but it has been contended that they have a right to pledge, without limit, the funds of the company in the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind." So, in *Salomons v. Laing*, 12 Beavan, 352, he says: "A railway company incorporated by act of parliament is bound to apply all the moneys and property of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever."

The same principle was adopted by the Lord Chancellor in the case *813] of *Bagshaw v. The Eastern Union *Railway Company*, 2 M'Naght. & G. 389, by Lord CRANWORTH, in *Beman v. Rufford*, as reported in the Jurist for this year,^(a) and, as we are told, by Vice Chancellor Turner, in the case of *The Great Northern Railway Company v. The Eastern Counties Railway Company*. In the last two cases, the learned judges treated questions similar to the present as purely legal questions, and therefore directed cases to be stated for the opinion of a court of law; but, at the same time, expressed their opinion that the contracts were illegal, and therefore void.

(a) 15 Jurist, 914.

If the contract is illegal, as being contrary to the act of parliament, it is unnecessary to consider the effect of dissentient shareholders; for, if the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds.

But it is said that it does not sufficiently appear upon this record that the bills in parliament, and for which the defendants covenanted to pay the costs, were not connected with the defendants' railway. If railway companies could embark in undertakings collateral to their main line, merely because the main line might in the result be benefited, there would be much in this objection; but, upon the view which we have above expressed, the objection cannot prevail.

We know that each of the four litigant companies has a separate act of parliament: we know that the statute incorporating the defendants' company gives no authority respecting the bills promoted by the plaintiffs: and we are, therefore, bound to say that any contract relating to such bills is not justified by the act of parliament, is not *within the scope of the authority of the company as a corporation, and [*814 is therefore void.

For these reasons, we are of opinion that there ought to be judgment for the defendants. Judgment for the defendants.

END OF MICHAELMAS VACATION.

REGULA GENERALIS.

TRINITY VACATION, 1851.

Production and Proof of Records.

“The judges, on the 13th of January, in the present year, referred to us to consider and report what are the proper regulations to be made as to the production and proof of records. We recommend that no order of a court or a judge for the issuing a *subpoena duces tecum*, where an original record is required, be made, unless the court or judge be satisfied that there is good reason for requiring the original record; and that no such *subpoena* be issued, until such order has been produced to the officer issuing the same, and filed with him, and until the writ has been made conformable to the description of the document contained in such order.

“Signed by ERLE, J., for himself and PLATT, B., and TALFOURD, J.

“Confirmed by the judges, 3d November, 1851.

“SAMUEL MARTIN.”

Received in this court from Mr. }
Baron MARTIN, Nov. 17, 1851. }

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term,

IN THE

FIFTEENTH YEAR OF THE REIGN OF VICTORIA. 1852.

The Judges who sat in Banco during this Term, were—

JERVIS, C. J.

CRESSWELL, J.

MAULE, J.

WILLIAMS, J.

**HARRISON and Others v. THE GREAT NORTHERN RAILWAY
COMPANY. Jan. 26.**

A contract under seal recited that the defendants, a railway company, were "desirous of being supplied with 350,000 sleepers of Dantzic or Memel timber." This contract was based upon a specification, prepared by the company, in which it was stated, that, "the number of sleepers required under this specification is 350,000; one-half will have to be delivered in 1847, and the remainder by Midsummer, 1848;" that, "the deliveries are to be made either by stacking the sleepers upon a wharf, or properly loading them into a boat or barge, or other vessel, as may be directed by the resident engineer;" and that the payments were to be made upon the engineer certifying the due delivery of each cargo.

By the contract, the plaintiffs covenanted to supply the company with 350,000 sleepers of the quality and description mentioned, and to deliver them, within the times mentioned in the specification, "as and when, and in such quantities, and in such manner, as the engineer of the company should by order or requisition in writing, from time to time, within the period limited by the specification, direct or require." The engineer was to be at liberty, at any time before the complete execution of the contract "by the delivery of the whole number of 350,000 sleepers," to alter their size, form, or construction, or to vary the times of delivery "of any of the said sleepers which should not then have been delivered." And the defendants, in consideration of the premises, covenanted to pay to the plaintiffs, "for or in respect

of the said sleepers hereinbefore contracted to be supplied," a certain price, upon their engineer certifying the due delivery of each cargo. And it was further agreed that 2000/ of the price should be retained by the company until two months after their engineer should have certified that "the whole of the said 350,000 sleepers hereinbefore agreed to be supplied by the said contractors, shall have been supplied:"

Held, that this was a positive contract by the plaintiffs to supply, and by the defendants to take and to pay for, the whole number of 350,000 sleepers; and that the plaintiffs were entitled to notice of the times when the sleepers would be required.

THIS was an action of covenant. The declaration stated, that, on the 12th of September, 1847, a certain indenture was made between the defendants of *the one part, and the plaintiffs of the other part, *816] —profert,—the tenor whereof follows in these words, that is to say, This indenture made, &c., between, &c., Whereas the said company are desirous of being supplied with 350,000 sleepers of Dantzic or Memel timber: And whereas the particular size and description of the said sleepers are set forth in the specification hereunto annexed, or hereunder written, and in certain drawings therein referred to; and in the same specification are also set forth the several times within which, and the port at which, the same sleepers will be required to be delivered: And whereas the said contractors are willing to supply the said company with the said 350,000 sleepers, upon the terms mentioned in the said specification, and in the tender of the said contractors, a copy of which is hereunder written, and to enter into the several covenants and agreements hereinafter contained: Now, this indenture witnesseth, that, in consideration of the covenants and agreements hereinafter contained on the part of the said company to be observed and performed, they the said plaintiffs do hereby, for themselves jointly, and each of them as a separate covenant doth hereby for himself severally, and for his heirs, executors, and administrators, covenant and contract with The Great Northern Railway Company, in manner following, that *817] *is to say, that they the said contractors, their executors, administrators, or assigns (such assigns to be approved of by or on behalf of the said company, as hereinafter required), some or one of them, shall and will, within the times and at the place mentioned in the said specification, as and when, and in such quantities, and in such manner as Joseph Cubitt, Esq., or John Miller, Esq., or other the principal engineer, or one of the principal engineers for the time being of the said company, shall, by order or requisition in writing under his hand, from time to time, or any time within the period limited in and by such specification, direct or require, furnish and supply the said company with 350,000 sleepers of Dantzic or Memel timber; that such sleepers shall be of such description, quality, manufacture, and size, and of such form and construction as are mentioned in the said specification, and to be equal in all respects to the specimens deposited with the said Joseph Cubitt, and now lying, &c.: That, in case the said Joseph Cubitt, or the said John Miller, or other the principal engineer, or any one of the principal engineers for the time being of the said company, shall, at

any time before the complete execution of this contract by the delivery of the whole number of 350,000 sleepers, be desirous of altering the size, form, or construction of, or of changing or varying the times of delivery of any of the said sleepers which shall not then have been delivered, he shall be at liberty so to do, and then and in such case a proportionate and fair alteration shall be made in the price to be paid for the sleepers, the size or form or construction of which shall be so required to be altered, or the times of the delivery of which shall be so changed or varied, either by increasing or diminishing, as the case may be, the price hereinafter agreed to be paid for each sleeper supplied by the said contractors; and it shall be lawful for the engineer of the said company by whom such *alteration or change shall be re- [*818
quired to be made, to settle whether any alteration in price shall
be made, and, if so, to what extent; provided always, that, in considering the question of such alteration of price, care shall be taken that the contractors shall derive the same proportionate amount of profit as they would have had if no such alteration as aforesaid had been required to be made: That, if any of the sleepers delivered by the said contractors in pursuance of their contract shall, in the opinion of the said Joseph Cubitt, or the said John Miller, or other the principal engineer, or any one of the principal engineers for the time being of the same company, be unsound or of inferior quality, or shall not agree in all respects with the said specification and with the specimens hereinbefore referred to, or, as the case may be, with the order or requisition of any such engineer as aforesaid, under the provisions for that purpose hereinbefore contained, it shall be lawful for the said Joseph Cubitt or the said John Miller, or for other the principal engineer for the time being of the said company, to reject the same, and, by a notice in writing under his hand, to be delivered to the said contractors, or any or either of them, or their or his executors, administrators, or assigns, or left at or sent by post directed to the last known place or places of abode in England of the said contractors, or any or either of them, or his or their executors, administrators, or assigns, to require the said contractors, their executors, administrators, &c., at their own expense, to remove or take away the same, and to supply an equal number of others in their place or stead, of the quality, dimensions, and kind required by the said specification, or by such order or requisition as aforesaid, within such period as shall by such notice be from time to time appointed or limited: That, in case the said contractors, their executors, administrators, or assigns, shall refuse or fail or neglect to deliver to the said company, at the place *where, and on or before the days or times at which the said [*819
Joseph Cubitt, or John Miller, or other the principal engineer,
or any one of the principal engineers for the time being of the company, shall have required the same to be delivered as hereinbefore mentioned, the required number of sleepers, of such size, form, construction, and

quality as are hereinbefore stipulated for, or as the case may be, of such other size, form, construction, and quality as may be required by any of the principal engineers for the time being of the said company. under the power for that purpose hereinbefore contained, or shall refuse or fail or neglect, when required so to do by such notice as aforesaid, to remove and take away any sleepers which shall have been rejected by any of the principal engineers for the time being of the company, and in their place or stead to substitute a like number of sleepers of proper form, size, construction, and quality, to the satisfaction of the said Joseph Cubitt, or the said John Miller, or other the principal engineer, or one of the principal engineers, for the time being, of the said company; then, and in every of such cases, it shall be lawful for the said company, or their agents, from time to time, at the costs and expense of the said contractors, their executors, administrators, or assigns, to purchase and provide such number of sleepers of like size, construction, and quality as aforesaid, as will make up the full number hereinbefore agreed to be supplied by the said contractors, their executors, administrators, or assigns, and also from time to time to supply the place of such sleepers as shall have been rejected as aforesaid, and whose place or places shall not have been supplied by the said contractors, their executors, &c., and also, after one month's notice to the said contractors, to remove such rejected sleepers as shall not have been taken away by the said contractors, their executors, &c., to such place or places as the said company or their agents may from time to time think proper, *without any liability on the part of the said
*820] company or their agents for any loss or damage which may thereby happen to such sleepers, either from the manner of removal or the insecurity of the place to which the same shall be removed, or from any other cause whatever: That, when and so often as the said company shall from any such cause as aforesaid, have been compelled to purchase any sleepers, it shall be lawful for any of the principal engineers for the time being of the said company to certify under his hand the amount of such purchase-money, and also the amount of the costs and value of the damage which the said company may have been put to or have sustained by such refusal, failure, or delay on the part of the said contractors, their executors, &c., to fulfil this contract, or any part thereof, and it shall be lawful for the said company from time to time to deduct the amount of such purchase-money, costs, and damages, when so certified as aforesaid, out of or from any moneys which shall be then due, or may thereafter become due, from the said company to the said contractors, their executors, &c., under or by virtue of these presents; and, in case the sum or sums so authorized to be deducted as aforesaid shall exceed the amount of money payable to the said contractors, their executors, &c., as aforesaid, then and in every such case the said contractors, their executors, &c., shall and will, on demand by the said company,

pay the excess of such purchase-money, costs, and damages, unto the said company: That, in case the said contractors, their executors, &c., shall not regularly deliver the said sleepers in such quantities and at such times and place as are or is herein agreed upon, to the satisfaction of the said Joseph Cubitt, or of the said John Miller, or of other the said principal engineer, or any one of the principal engineers, for the time being, of the said company, according to this contract, or shall from any cause whatsoever other than the acts of the said company, their *officers, engineers, or authorized agents, be prevented from [*821 making such delivery or deliveries as aforesaid, according to this present contract, and if such default, impediment, or delay shall continue for the space of fifteen days next after notice in writing, signed by the secretary of the said company, or by the said Joseph Cubitt or the said John Miller, or by other the principal engineer, or by any one of the principal engineers for the time being of the said company, requiring them to put an end to such default, impediment, or delay, shall have been given to the said contractors, or any or either of them, or to their or his executors, &c., or left for or sent by post directed to them, or any or either of them, at their or any or either of their usual or last known place or places of abode in England; or, if they the said contractors, before the completion of this contract, shall be declared bankrupt or insolvent, then and in any of such cases it shall be lawful for the said company, if and as they shall think proper, by writing under the hand of the secretary of the company to be delivered to the said contractors, or any or either of them, or their or his executors, &c., absolutely to determine this contract; and, in such case, all the moneys due from the said company to the said contractors, but which according to the agreements herein contained shall not have been actually paid to them in possession, and all moneys which otherwise would have become payable to them thereafter from the said company, shall be held and retained by the said company, and be applied in payment to them of all costs, damages, and expenses which, in the judgment of the said Joseph Cubitt, or of the said John Miller, or of the principal engineer or any one of the principal engineers for the time being of the said company, they shall actually sustain or be put to by reason of the default of the said contractors: That, if the moneys so retained by the said company under the last foregoing agreement shall be *insufficient to discharge the expense of providing all [*822 such sleepers as shall have been so neglected to be supplied by the said contractors, and to indemnify the said company against all such costs, damages, and expenses as aforesaid, then the said contractors, their executors, &c., shall and will make good and pay to the said company such deficiency, on demand: That, if the moneys so retained shall be more than sufficient fully to indemnify the said company in manner aforesaid, then and in such case the surplus thereof

shall be paid over by them to the said contractors, their executors, &c.: That all such forfeitures, penal sums, and reservations as are herein, eventually or otherwise, reserved or agreed to be paid or made respectively to the said company, are stipulated and intended to be specifically rendered to or retained by them in the nature of liquidated damages; and that no relief against the same forfeitures or reservations shall be sought in any court of law or equity; and these presents shall or may be pleaded in bar to any such relief, or application for the same: That the said contractors, their executors or administrators, shall not nor will, unless with the previous consent of the said company, signified in writing under the hand of the secretary of the said company, assign, transfer, or sublet the contract hereby entered into, or any part thereof; and that no such contract shall be valid, unless it contains the names or name of the persons or person to whom such assignment, transfer, or subletting, is proposed to be made, and also the number of sleepers to be by such person or persons supplied; and that no such sub-contract or assignment, with or without the consent of the said company, shall exonerate the said contractors, their heirs, executors, or administrators, from their respective liability under these presents for the due performance of all the matters herein comprised; and such liability shall continue unaffected by any such subletting

*823] *or assignment: And this indenture further witnesseth, that, in consideration of the premises, and of the covenants and agreements hereinbefore contained on the part of the said contractors to be observed and performed, the said Great Northern Railway Company do hereby covenant and agree with the said contractors, their executors, &c., that they the said company shall and will pay to the said contractors, their executors, &c., for or in respect of the said sleepers hereinbefore contracted to be supplied, the price of 4s. 3d. per sleeper, at the times and in manner hereinafter mentioned, that is to say, that, when and as often as the said Joseph Cubitt or John Miller, or other the principal engineer, or one of the principal engineers for the time being of the said company, shall have certified, in the manner hereinafter mentioned, that a cargo of sleepers to an amount or value stated in such certificate has been delivered, and that the sum stated in such certificate as the amount or value of such sleepers is due and owing to the said contractors, and no deductions are to be made therefrom on account or in respect of the several sums of money hereinbefore authorized to be deducted from the sums payable to them by the said company, then the said company shall and will forthwith pay unto the said contractors, their executors, &c., the sum stated in such certificate as the amount or value of such sleepers; or, in case any deductions are to be made therefrom, then so much thereof as may be due and owing to them after such deductions shall have been made: And it is hereby further agreed that each delivery or cargo of sleepers shall be examined

by the resident engineers of the company, or other the parties who may be appointed by the said company for that purpose, who shall certify the number thereof which are in accordance with the true intent and meaning of the said specification, and of this contract; and, when such certificate shall have been countersigned *by the said Joseph [*824 Cubitt or the said John Miller, or by other the principal engineers for the time being of the said company, the said contractors, their executors, &c., shall be entitled to receive from the said company, within one calendar month from the time of the delivery of each cargo, the amount of the moneys payable to them in respect thereof, according to the agreements herein contained: Provided always, that the said sleepers shall not be deemed to have been duly supplied, nor shall the said contractors, their executors, &c., be entitled to receive payment for the same in manner aforesaid, unless the same shall have been supplied in all respects according to the forms and requirements of the said specification, and of this contract, and shall have been certified by the said resident engineer to have been so supplied, and his certificate thereof shall have been countersigned in manner aforesaid: Provided always, and it is hereby agreed and declared between and by the said parties hereto, and the said plaintiffs (naming them) do, and each of them doth, hereby consent and agree, notwithstanding the covenants hereinbefore contained for payment by the said company of the full amount due to the said contractors, for sleepers delivered, within one calendar month from the delivery thereof, that no sum of money shall be claimed by or received by them on account of the sleepers so supplied, until sleepers above the value of 2000*l.* shall have been delivered to and certified to have been received by the said company; and that, as soon as sleepers to the amount or value of 2000*l.* shall have been so delivered to and certified to be received by the said company, such sum of 2000*l.* shall not be paid to the said contractors, but shall be retained by the said company, without interest, and the excess only of the value of the sleepers supplied over and above the sum of 2000*l.* shall be from time to time paid to the said contractors; it being the intention of the parties hereto that the payment to the *said contractors on account of the sleepers supplied by them [*825 under this contract shall always fall short of, and be less by 2000*l.* than, the sum actually due to them on account thereof,—to the end and intent that the said company may always have in their hands the sum of 2000*l.* for the purpose of securing the due performance of this contract, and the payment of the several sums which may be due to the said company by the said contractors, their executors, &c., under or by virtue of the provisions of these presents: And it is hereby further agreed, that, within two calendar months after the whole of the said 350,000 sleepers hereinbefore agreed to be supplied by the said contractors shall have been supplied, and a certificate thereof shall have

been signed by the said Joseph Cubitt, or the said John Miller, or by the principal engineer, or any one of the principal engineers for the time being of the said company, and all demands between the said company and the said contractors, their executors, &c., shall have been finally settled and adjusted, the said sum of 2000*l.* so agreed to be retained by the said company for the purposes aforesaid, or so much thereof as may then remain due and owing to the said contractors, their executors, &c., by the said company, shall be paid over to them by the said company: Provided, nevertheless, that neither the certificate of the engineer of the said company declaring the sums owing to the said contractors, their executors, &c., from time to time, nor the payment of the said sum of 2000*l.*, or the balance thereof, shall operate to release them from their liability to remove and carry away any sleepers supplied by them, which may have been previously rejected on the behalf of the said company, and to supply other sleepers in their places or stead: And it is hereby further agreed, that, in case, and so often as, any dispute shall arise between the said company and the said contractors, their executors, &c., concerning or relating to the said *826] sleepers *hereby contracted for, or any of them, or to any covenant, engagement, matter, or thing herein contained, the subject of every such dispute shall be referred to the decision of the said Joseph Cubitt or John Miller, or other the principal engineer, or any of the principal engineers for the time being of the said company, at the option of the said company, whose decision and determination shall be final and conclusive and binding upon all parties: And it is hereby further agreed, that, when and as often as any cargo or quantity of sleepers shall have been delivered as aforesaid by the said contractors, and shall have been examined by some resident engineer of the company or other the parties who may be appointed by the said company for that purpose, and who shall have certified the number thereof which are in accordance with the true intent and meaning of the said specification and this contract, the same and every of them, and every part thereof, shall, immediately after the signing of such certificate, and notwithstanding the same shall not have been countersigned by one of the principal engineers of the said company, be and be considered to remain at the sole risk and expense of the said company in all respects: And, lastly, it is hereby agreed that the costs, charges, and expenses attending the preparation and execution of this contract, and of a bond to be entered into by the said contractors for the due and complete performance of the several covenants, conditions, and agreements herein contained, and on their part and behalf to be observed and performed, shall be borne and paid, in equal proportions, by the said contractors, their executors, &c., and the said company.

The declaration then set out the specification, conditions of tender, and tender, which were alleged to have been annexed to and to have

formed part of the indenture. In the former were the following, among other, provisions :—The number of sleepers required *under this specification, is 350,000. One-half will have to be delivered in [*827 1847, and the remainder by Midsummer, 1848. The port at which the deliveries will have to be made, is Goole. [Then followed a description of the sleepers, and a drawing.] All sleepers which in the judgment of Mr. Joseph Cubitt or Mr. John Miller, engineers to The Great Northern Railway Company, are in any respect inferior to the above specification, will be rejected, and their amount deducted from the payments. Each delivery or cargo of sleepers will be examined by the resident engineers or other parties appointed for the purpose ; and they will certify the number thereof which are in accordance with the true intent and meaning of this specification ; and payment will be made on their certificates, countersigned either by Mr. Joseph Cubitt or Mr. John Miller, according to the districts to which the respective deliveries appertain. The deliveries are to be made either by stacking the sleepers upon a wharf, or properly loading them into a boat or barge or other vessel, as may be directed by the resident engineer ; and all labour and expense of all kind incurred in so stacking them upon the wharf, or loading them into a boat, barge, or vessel as aforesaid, to be paid for by the contractors. Payments will be made monthly, within one month of the date of the engineer's certificate of each cargo, after sleepers to the amount of 5000*l.* shall have been delivered and certified ; which sum of 5000*l.* shall remain in the hands of the company, without interest, as a guarantee for the due and proper performance of the contract, until two months after date of certificate by the engineer that the said contract is completed, and to his satisfaction ; and, should the contractor refuse to execute his contract in accordance with all the terms and conditions herein specified, the said sum of 5000*l.* shall become forfeit to the company. Tenders are to be made at a *price per sleeper, which [*828 price is to include every expense whatever attendant on the supply, delivery, stacking, or stowing of the sleepers, except dues and wharfage at the ports where the deliveries are made. The party whose tender may be accepted, will be required to execute a regular contract and bond prepared by the company's solicitor, embodying the terms and conditions herein specified, for the due performance of his contract ; the expenses of preparing such contract and bond to be borne equally by the two contracting parties.

What was called in the declaration the "tender," was contained in a letter addressed by the plaintiffs to the secretary of the company, in which was the following passage,—“ We now beg leave to hand you a contract for the 200,000 sleepers which your company *have agreed to take* ; and, in reference to a further quantity delivered at Goole, we will undertake to supply 300,000, or as many more as you may want to complete your line, at the same price, 4*s.* 3*d.* each.”

The declaration, after averring the identity of the documents set out, and of the contracting parties, proceeded to aver,—That, after the making of the said indenture, and before this suit, the year of our Lord 1847, and Midsummer in the year of our Lord 1848, elapsed and expired: That, as to the said half of the said sleepers, to wit, 175,000 thereof, covenanted as aforesaid to be delivered in the year 1847, the plaintiffs had always fulfilled all things in the said indenture contained on their part to be fulfilled in respect of the said half of the said sleepers to be delivered in the year 1847, except so far as they were prevented by the defendants and their engineers as hereinafter mentioned: That, as to the said half of the said sleepers, to wit, 175,000 thereof, to be delivered in the year 1847, they were always ready and willing, within the time and at the place mentioned in the said specification for the *829] delivery of the *said half of the said sleepers, to wit, during the said year 1847, at Goole, as, when, and in such quantities, and in such manner, as the said Joseph Cubitt or the said John Miller, or other the principal engineer or one of the principal engineers for the time being of the said company, should, by order or requisition in writing under his hand, from time to time, or at any time within the period limited in that behalf in and by the said specification, direct or require, to furnish and supply the defendants with the said half of the said sleepers, of Dantzic or Memel timber, of such description, quality, manufacture, and size, and of such form and construction, as were mentioned in the said specification, and to be equal in all respects to the said specimens in the said indenture in that behalf mentioned, and in all respects according to the said indenture; and that the said year 1847 elapsed before this suit: Yet that the said Joseph Cubitt did not, nor did the said John Miller, or any other principal engineer or engineers of the said company, in or during the said year 1847, or at any time, make or give to the plaintiffs, or either of them, any order or requisition in writing under his or their hands, touching or concerning the said half of the said sleepers to be delivered as aforesaid in the said year 1847, or any part thereof, or the delivery thereof, or any part thereof, or the manner, time, or quantity in which the said half of the said sleepers, or any part thereof, was to be delivered; whereby the plaintiffs were wholly deprived of the gains and profits which they might and otherwise would have made by the delivery of and payment for the said half of the said sleepers according to the said indenture, to wit, 20,000*l.*: That, as to the remainder of the said sleepers, to wit, 175,000 thereof, covenanted as aforesaid to be delivered by Midsummer, 1848, they the plaintiffs had always fulfilled all things in the said indenture contained on their part *830] to be fulfilled *in respect of the said remainder of the said sleepers, except so far as they were hindered by the defendants and their engineers as hereinafter mentioned; and that, as to the said remainder of the said sleepers, to wit, 175,000 thereof, covenanted as

aforesaid to be delivered by midsummer, 1848, they were always ready and willing, within the time and at the place mentioned in the said specification for the delivery of the said remainder of the said sleepers, to wit, until and at Midsummer, 1848, at the said port of Goole, as and when, and in such quantities, and in such manner, as the said Joseph Cubitt or the said John Miller, or other the principal engineer, or one of the principal engineers for the time being of the said company, should, by order or requisition in writing under his hand, from time to time, or at any time within the period limited in that behalf in and by the said specification, direct or require, to furnish and supply the defendants with the said remainder of the said sleepers of Dantzic or Memel timber, of such description, quality, manufacture, and size, and of such form and construction, as were mentioned in the said specification, and to be equal in all respects to the said specimens in the said specification in that behalf mentioned, and in all respects according to the said indenture: Yet that the said Joseph Cubitt did not, nor did the said John Miller, or any other principal engineer or engineers of the said company, in or during the said year 1847, or before or at Midsummer, 1848, or at any time, make or give to the plaintiffs, or either of them, any order or requisition in writing under his or their hands, touching or concerning the said remainder of the said sleepers to be delivered as aforesaid by Midsummer, 1848, or any part thereof, or the delivery thereof, or any part thereof, or the manner, time, or quantity in which the remainder of the said sleepers, or any part thereof, was to be delivered; whereby the plaintiffs were wholly deprived of the gains and profits which *they might and otherwise would have made by the delivery of, and payment for, the said remainder of the said [*831 sleepers, according to the said indenture, to wit, 20,000*l.*, &c.

The defendants pleaded, amongst other pleas, fourthly,—as to so much of the declaration as related to the said half of the said sleepers so covenanted as therein mentioned to be delivered in the year 1847, and the causes of action in relation thereto;—that the plaintiffs did not, during any part of the said year 1847, deliver to the defendants the said half of the said sleepers, or any part thereof, at the said place mentioned in the said specification for the delivery thereof; wherefore the defendants prayed judgment if the plaintiffs ought to have or maintain their aforesaid action against them, &c.

The seventh was a similar plea, as to so much of the declaration as related to the remainder of the said sleepers covenanted to be delivered by Midsummer, 1848.

The eighth plea stated that the plaintiff did not, nor did either of them, at any time request the defendants or the said Joseph Cubitt, or the said John Miller, or any of the principal engineers for the time being of the defendants, or other person or persons in that behalf authorized to make or give the same, to make or give to the plaintiffs,

or either of them, any order or requisition in writing under his or their hands, touching or concerning any part of the said 350,000 sleepers so contracted by the defendants to be delivered as aforesaid, or the delivery thereof, or the manner, time, or quantity in which they, or any part thereof, were to be delivered, wherefore the defendants prayed judgment if the plaintiffs ought to have or maintain their aforesaid action against them.

Special demurrers, assigning for causes,—as to the fourth plea, that it set up as a defence the non-delivery which the defendants themselves *832] prevented by their *conduct; and that it was improperly pleaded to a part of the declaration which was not the cause of action declared for, and to which no plea could properly be pleaded, and the introductory part thereof excepted the real gist of that part of the count to which it purported to be an answer;—as to the seventh plea, that it set up as a defence the very nondelivery which the conduct of the defendants prevented the plaintiffs from making, and was improperly pleaded to a part of the declaration to which a plea ought not to be pleaded, inasmuch as the same of itself did not constitute a cause of action: and that it excepted so much of that part of the declaration to which it was pleaded as constituted the gist of the cause of action alleged in that part;—and, as to the eighth plea, that the request which the defendants thereby denied was unnecessary; and that, if the plea were good as a traverse, it ought to conclude to the country.

The defendants joined in demurrer.

Willes (with whom was *Bramwell*), in support of the demurrers.(a)—The real question between the parties, is, whether this is a one-sided contract, binding the plaintiffs to supply a given number of sleepers if required so to do by the defendants, without any corresponding obligation on the latter to give orders for or to take them. The indenture was entered into upon the assumption that 350,000 sleepers were to be furnished. So far the contract is in terms absolute. The time, place, and manner of delivery rest with the company's engineers: in the absence of such orders, no sleepers could be supplied. [JERVIS, C. J.—Do you take it to be conceded that the plaintiffs could not deliver without first receiving directions from the engineers?] That is undoubt- *833] edly the effect of the *contract. The engineer might alter the shape of the sleepers: it never could have been intended, therefore, that the plaintiffs should make and tender the whole number, before they could call upon the defendants to perform their part of the contract. If there be any ambiguity in the contract,—which, it is submitted, there is not,—the court will put that construction upon it which is the most probable, and the most reasonable and consistent with the ordinary transactions of commerce.

Bovill (with whom was *Byles*, Serjt.), contra.—The true meaning of

(a) *Bovill*, for the defendants, intimated that he should not support the pleas, but would object to the sufficiency of the declaration.

this contract is, that the company will pay a certain stipulated price per sleeper, for so many as shall be delivered, with certain limits as to time and number. Assuming that the company are obliged to take them at all, the utmost the contract can amount to, is that. The stipulation that the deliveries shall take place when and in such quantities and in such manner as the engineer shall direct, is a stipulation introduced for the benefit of the company, and is contained in a covenant by the plaintiffs. The plaintiffs undertake to deliver one-half of the stipulated number in 1847, and the remaining half within the following six months. That undertaking would be satisfied by a delivery of half on the 31st of December, 1847, and the residue on the 30th of June, 1848: *Startup v. Macdonald*, 2 M. & G. 395 (E. C. L. R. vol. 40), 2 Scott, N. R. 485; in error, 6 M. & G. 593 (E. C. L. R. vol. 46), 7 Scott, N. R. 269. For the benefit of the company, therefore, it is stipulated that the times and manner of delivery shall be regulated by their engineer. They are words of qualification only, and not of contract. In *Wolveridge v. Steward*, 1 C. & M. 644,† 3 M. & Scott, 561 (E. C. L. R. vol. 30), A., by indenture executed by himself and B., assigned to B. certain premises, "subject to the payment of the rent and to the performance of the covenants and agreements reserved and contained *in the original lease:" B. entered under this assign- [*834 ment, and afterwards assigned over to a third person: and it was held that B. was not liable in covenant to A., for rent which the latter had been called upon to pay in consequence of the default of B.'s assignee,—the words "subject to the payment of the rent," &c., being words of qualification, and not of contract. "It is fully established," says TINDAL, C. J., "that no precise form of words is necessary to constitute a covenant,—'Any words in a deed which *show an agreement* to do a thing, make a covenant': (a) but it must be clear that they are meant to operate *as an agreement*, and not merely as words of condition or qualification. (b) Are, then, the words in question meant to be used as words of agreement between the assignor and assignee, or words of qualification to modify and restrain the generality of the words which precede, and to express clearly the intention of the assignor, not to assign an absolute term, but a term subject to all the obligations towards the lessor to which it was originally liable? To determine this, we must look at the indenture as stated on the record, and observe in what part the words occur. They come after the *habendum*, and constitute a part of it. Though the indenture contains the language of both parties, in the granting part the words are those of the grantor, which are to be taken most strongly against himself; and therefore it was material for him to qualify the grant, that he might not be considered as conveying any greater estate than he.

(a) Com. Dig. *Covenant*, (A. 2.)

(b) Com. Dig. *Covenant*, (A. 3), 1 Roll. Abr. 518.

really intended: this is properly done in the *habendum*. The office of the *habendum* is, to limit the certainty of the estate.(a) ‘It doth qualify the general intendment of the premises; and the reason of this is, for that it is a maxim of law that any man’s grant shall be taken by *835] *construction of law most forcible against himself.’(b) As these expressions, therefore, occur in that part of the deed in which they ought to be if their object was merely to qualify and abridge the generality of the granting part, it is highly probable that they were intended to have that effect only; and some instances were adduced by the counsel for the plaintiff in error, where similar words occurring in the same part of the deed could not possibly have any other signification.” No notice, therefore, was necessary. Now, what do the defendants covenant? “In consideration of the premises, and of the covenants and agreements hereinbefore contained on the part of the contractors to be observed and performed, the said company do hereby covenant and agree with the said contractors, that they the said company shall and will pay to the said contractors, for or in respect of the said sleepers hereinbefore contracted to be supplied, the price of 4s. 3d. per sleeper, at the times and in manner hereinafter mentioned,” that is, when the deliveries shall have been certified by the engineer. The engineer’s certificate was a condition precedent to the plaintiffs’ right to the money: *Morgan v. Birnie*, 9 Bingh. 672 (E. C. L. R. vol. 23), 3 M. & Scott, 76 (E. C. L. R. vol. 30); *Worsley v. Wood*, 6 T. R. 710. As well might it have been contended in those cases, that there was a covenant, in the one that the surveyor, and in the other the rector and churchwardens, *should* certify. [WILLIAMS, J.—Here, the engineer was to act as the servant of the company, not as an arbitrator, or *quasi* arbitrator.] In *Aspdin v. Austin*, 5 Q. B. 671 (E. C. L. R. vol. 48), 1 Dav. & Mer. 515, by agreement between the plaintiff and defendant, the plaintiff agreed to manufacture for the defendant cement of a certain quality; and the defendant, on condition of the plaintiff’s performing such engagement, promised to pay him *836] *4l. weekly during the two years following the date of the agreement, and 5l. weekly during the year next following, and also to receive him into partnership as a manufacturer of cement at the expiration of three years; and the plaintiff engaged to instruct the defendant in the art of manufacturing cement,—each party binding himself in a penal sum to fulfil the agreement; and the defendant afterwards covenanted by deed for the performance of the agreement on his part: and it was held, that the stipulations in the agreement did not raise an implied covenant that the defendant should employ the plaintiff in the business during three or two years, though the defendant was bound, by the express words, to pay the plaintiff the stipulated wages during those periods respectively,

(a) Co. Litt. 6 a.

(b) Co. Litt. 133 a. See also Hale, 171, Com. Dig. *Fait* (E. 9).

if the plaintiff performed, or was ready to perform, the condition precedent on his part. Lord DENMAN there says: "Where parties have entered into written engagements, with express stipulations, it is manifestly not desirable to extend them by any implications: the presumption is, that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect: and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted." *Dunn v. Sayles*, 5 Q. B. 685 (E. C. L. R. vol. 48), 1 Dav. & Mer. 519, is to the same effect. Speaking of one-sided *contracts, PARKE, B., in *Kennaway v. Treleavan*, 5 M. & W. 498,† says: "A great number of the cases are of contracts not [*837 binding on both sides at the time when made, and in which the whole duty to be performed rests with one of the contracting parties." There is nothing unreasonable, therefore, in the construction contended for here on the part of the defendants.

Willes, in reply.—The plaintiffs clearly had no right to deliver the sleepers before they received the engineer's instructions as to the time and manner of the delivery: if they had, the company would be deprived of the option of altering the shape of the article. The obvious meaning of the contract was, that the engineer should have an option as to the time and manner of delivery, but not as to whether the company should take the whole number of sleepers contracted for or not. The cases of *Aspdin v. Austin* and *Dunn v. Sayles* are very much qualified by the subsequent cases of *Pilkington v. Scott*, 15 M. & W. 657,† in the Exchequer, and *Hartley v. Cummings*, 5 C. B. 247 (E. C. L. R. vol. 57), in this court. In the latter case, A. contracted to serve B. and his partner or partners for the time being, for seven years, in his business of a glass and alkali manufacturer, and at all times during the term to do his best endeavours, and use his utmost care and diligence in the works; and, further, that he would not, at any time during the term, neglect or absent himself from the said service, without the consent in writing of B. or his partner or partners for the time being, or either or such of them as should carry on the business; nor would work for or serve any other person or persons, without such consent: in consideration of which service, B. agreed to pay A. 24s. per week for a certain amount of work, and to find him some other description of work pro-

*838] vided he should *not require that quantity of the specified work, so that A.'s wages should not be less than 24s. per week, except when a furnace should be out, when A. agreed to work for 21s. per week: and it was agreed, that, if A. should be sick or otherwise incapacitated from performing the service, or in case of misconduct, or if B. or his partner or partners for the time being, or either or such of them as should carry on the trade, should discontinue the trade during the term,—in either of such cases, B. or his partners should be at liberty to retain or employ any other person in the room or stead of A., without being obliged to pay him any wages or satisfaction: and it was held, that this agreement was not void for want of mutuality, or as being in unreasonable restraint of trade. [WILLIAMS, J., referred to *Wood v. The Copper Miners' Company*, 7 C. B. 906 (E. C. L. R. vol. 62). There, by an instrument under seal, expressed to be made and entered into between the defendants and the plaintiff, it was "agreed by and between the parties," amongst other things,—that the defendants should grant a lease of certain premises to the plaintiff, for twelve years, at a peppercorn rent, for the purpose of the plaintiff's carrying on therein the manufacture of patent-fuel,—that all the coal consumed and used by the plaintiff for the purpose of his manufacture during the term, should be bought and purchased of the defendants, provided the defendants *could and should* supply him with the quantity that should from time to time be required by him, or to such extent as the defendants *could* supply,—and, further, that the defendants should not be compelled to supply more than 500 tons per week; and that, in case the defendants should, from some substantial cause, be unable to supply small coal *to the extent agreed upon*, they should give the plaintiffs six months' notice of such their inability, and in such *case the plaintiff should be at liberty to obtain his supply of coal, or the excess beyond the quantity the defendants could supply, from any other source: and it was held, that this instrument was properly declared upon as a *covenant* on the part of the defendants to supply the plaintiff with coal to the extent of 500 tons weekly, unless unable from some substantial cause.] *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court:—

It was admitted, upon the argument of this case, that the pleas could not be supported: but Mr. *Bovill* contended that the declaration was bad, and that the defendants were not liable, because the contract set forth in the declaration cast upon the defendants no obligation to take all the sleepers which the plaintiffs were bound to furnish, and because, if the defendants *were* bound to take all such sleepers, the plaintiffs were bound to deliver them at the times and places mentioned in the specification, without waiting for orders from the defendants' engineers.

We have carefully considered the declaration, and are of opinion that

it is good, and that upon both points the plaintiffs are entitled to our judgment.

To ascertain the true meaning of the parties, we must look at the contract and specification, which by reference form one instrument. The defendants covenant to pay the plaintiffs, "for and in respect of all the said sleepers hereinbefore contracted to be supplied, the price of 4s. 3d. per sleeper." What are "the said sleepers hereinbefore contracted to be supplied?" The plaintiffs say they are a fixed number of 350,000; the defendants say they are so many as we may require of that number, at the discretion of our engineer, and no more. An examination of the instrument will show that this view of *the defendants cannot be supported. Before the contract was made, [*840 the defendants had ascertained the number of sleepers they should want, and, accordingly, in their specification, said,—"The number of sleepers *required* under this specification, is 350,000." Upon this basis, the contract was made. It recites that the defendants were desirous of being supplied with 350,000 sleepers, and that the plaintiffs were willing to supply the said 350,000 sleepers mentioned in the specification, and contains a covenant on the part of the plaintiffs to supply the defendants with 350,000 sleepers. With the same view, a discretion is given to the engineers of the company to alter the shape of the sleepers "at any time before the complete execution of the contract by the delivery of the whole number of 350,000 sleepers;" and provision is made, with reference to the payment for the sleepers, which entitles the defendants to retain in their hands the sum of 2000*l.*, until two months after the whole of the said 350,000 sleepers agreed to be supplied by the contractors, shall have been supplied. If the defendants were not bound to take the whole number, the event here contemplated might never arise, and the plaintiffs might in that case have supplied sleepers to the value of 2000*l.*, without the means of compelling payment for the same. Indeed, the parts of the contract referred to by Mr. *Bovill*, when taken in contrast with the rest of the instrument, show that the whole number of sleepers was to be taken. Much is left to the discretion of the defendants' engineers. They may say when and in what number the sleepers are to be delivered, within certain limits: they may alter the shape of the sleepers: they must examine, and may reject those which are defective: they are to certify the number and value of those delivered: and they have, in other respects, various powers expressly conferred upon them. But, although the discretion of the engineers is thus minutely and expressly defined, they *have no power to say how many sleepers shall be delivered. [*841 The contract is not, to supply so many sleepers as may be required by the engineers, not exceeding 350,000; but to supply the fixed number of 350,000, the number which the defendants say is required, by the specification.

The second point is clear, on the face of the instrument. The defendants are bound to take, and the plaintiffs are bound to supply, 350,000 sleepers; but they are to be delivered, within certain limits, as and when, and in such quantities, and in such manner, as the engineers shall direct. The engineers have authority to alter the shape of the sleepers, before the contract is completed; and the contractors are not bound, without notice, to have the sleepers cut in the shape specified, with the risk of having them thrown upon their hands, should the engineers think fit to alter the shape of the sleepers. The contractors could not have delivered half of the sleepers on the day of the execution of the deed, and the other half on the 1st day of January, 1848. Such a delivery would have satisfied the precise words of the specification, but not the spirit of the contract; for, in such case, the engineers would not have had an opportunity of saying when, and in what quantities, and in what manner, the sleepers should be delivered. They would not have had an opportunity of altering the shape of the sleepers, if they had thought proper; and the plaintiffs would have forestalled the times of payment, which are to depend upon the deliveries, as required by the engineers.

For these reasons, we are of opinion that the defendants are bound to take the whole number of 350,000 sleepers; and that the plaintiffs were entitled to notice of the times when the sleepers would be required; and that, consequently, the plaintiffs are entitled to judgment.

Judgment for the plaintiffs

*842] *KENDALL v. BAKER. *Jan. 22.*

In a lease of land for 21 years from the 25th of March, 1848, it was covenanted that the lessee should pay a stipulated sum for the first year,—with a proviso that the rent for each subsequent year of the term should be reduced or increased according to “the average price of wheat in any one year of the said term,” such average “to be taken and ascertained from the then current year’s averages which were taken in the month of January in every year under and by virtue of the tithe commutation act, 6 & 7 W. 4, c. 71, s. 56,”—which is the result of the sales “during seven years ending on the Thursday next before Christmas Day then next preceding:—Held, that the rent must be computed according to such septennial average so published in each year.

THIS was an action of debt on a demise. The declaration stated, that, before the commencement of this suit, to wit, on the 25th of March, 1848, by a certain indenture then made between the plaintiff of the first part, the defendant of the second part, and Samuel Cave Fidgeon of the third part,—profert,—it was witnessed, that, for the considerations therein mentioned, the plaintiff did demise, lease, and to farm let, unto the defendant, his executors, &c., a certain farm, tenements, and premises, with the appurtenances, in the said indenture particularly described (except as therein excepted), to hold the same unto the defendant, his executors, &c., from the 25th of March then instant, for and

daring and unto the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended; yielding and paying therefor, yearly and every year during the continuance of that demise, unto the plaintiff, his heirs or assigns, the rent of 620*l.* (subject to the proviso or agreement next hereinafter contained for reducing or increasing the said yearly rent) in and for every year of the said term (except the first year thereof), at two days of payment in the year, viz., the 29th of September, and 25th of March, in every year, by equal portions; the first of such half-yearly payments to begin and be made on the 29th of September next ensuing the day of the date thereof; such payment to be made without any deduction or abatement whatsoever for or in respect of any taxes, charges, levies, rates, *assessments, payments, or outgoings whatsoever, which then [*843 were, or at any time thereafter during the continuance of that demise might be, taxed, rated, charged, assessed, or imposed upon or in respect of the said premises thereby demised, or any part thereof (except only the land-tax and property-tax): Provided always, and it was thereby declared and agreed by and between the said parties to those presents, that the said yearly rent should be subject or liable to be, and should be, reduced, or increased, in every year of the said term except the first year thereof, in manner following, that is to say, when the average price of wheat in any one year of the said term (such average price to be taken and ascertained from the then current year's averages which were taken in the month of January in every year, under and by virtue of the tithe-commutation act, 6 & 7 W. 4, c. 71) should be under 48*s.* per quarter, and not under 40*s.* per quarter, then the rent of the said premises for such year of the said term shall be 570*l.*: when the average price of wheat in any one year of the said term (such average price to be taken and ascertained as aforesaid) should be under 40*s.* per quarter, then the rent of the said premises for such year of the said term should be 520*l.*: when the average price of wheat in any one year of the said term (such average price to be taken and ascertained as aforesaid) should be above 68*s.* per quarter, and not above 76*s.* per quarter, then the rent of the premises for such year of the said term should be 670*l.*: and, when the average price of wheat in any one year of the said term (such average price to be taken and ascertained as last aforesaid) should be above 76*s.* per quarter, then the rent of the premises for such year of the said term should be 720*l.*: And the defendant and the said Samuel Cave Fidgeon did thereby, for themselves jointly, and for their heirs, executors, &c., and each of them did thereby, for himself severally, his heirs, executors, &c., covenant with *the plaintiff, [*844 his heirs and assigns, in manner following, that is to say, that they the defendant and Samuel Cave Fidgeon, or one of them, their or one of their executors, &c., should and would, yearly and every year during the continuance of that demise, well and truly pay or cause to

be paid unto the plaintiff, his heirs and assigns, the said yearly rent of 620*l.*, or other the said reduced or increased yearly rent, to be ascertained as thereinbefore mentioned,—as by the said indenture, reference being thereunto had, would, amongst other things, more fully and at large appear. The declaration then proceeded to allege that the defendant entered upon the premises by virtue of the demise, and that, whilst he was so possessed, certain rent became due, viz. 310*l.* for a half year ending on the 29th of September, 1849, 310*l.* for a half year ending on the 25th of March, 1850, 310*l.* for a half year ending on the 29th of September, 1850, and 310*l.* for a half year ending on the 25th of March, 1851, and still remained in arrear and unpaid.

The defendant pleaded,—that no part of the sums of the yearly rent in the declaration alleged to be in arrear and unpaid, accrued due until after the expiration of the first year of the said term of twenty-one years; that the average price of wheat in each and every year of the said term during which each and every of the four several half-yearly sums of the rent in the declaration alleged to be in arrear and unpaid, accrued due (such average price being taken and ascertained as in and by the said indenture is mentioned and required), was under 48*s.* per quarter, and not under 40*s.* per quarter; and that, by reason thereof, the rent of the demised premises for each and every year of the said term during which each and every of the said four several half-yearly sums of the rent in the declaration alleged to be in arrear and unpaid, accrued, was 570*l.*, according to the proviso and agreement in that behalf in the said indenture contained; that the four several half-yearly *845] sums of the said yearly *rent of 570*l.* for the four several half-yearly spaces of the said term in the several breaches of the declaration mentioned, amounted to a certain sum, to wit, to 1140*l.* and no more; and that, after the accruing of the same four several half-yearly payments of the said rent, and before the commencement of this suit, to wit, on the 26th of March, 1851, he the defendant paid to the plaintiff, and the plaintiff then accepted and received of and from the defendant, divers moneys, amounting in the whole to a large sum of money, to wit, 1140*l.*, in full satisfaction and discharge of the said four several half-yearly arrears of rent, and of the debts and causes of action in the declaration mentioned, and of all damages in respect thereof,—verification.

To this plea the plaintiff replied,—that the average price of wheat in each and every year of the said term during which each and every of the said four several half-yearly sums of the rent in the declaration alleged to be in arrear and unpaid, accrued due (such average price being taken and ascertained as in and by the said indenture is mentioned and required), was not under 48*s.* per quarter; and that the defendant did not pay to the plaintiff, nor did the plaintiff accept or receive of the defendant, the said moneys in the plea mentioned in such full satisfac-

tion or discharge, and in manner and form, in the said plea in that behalf alleged, concluding to the country. Issue thereon.

The following case was, under a judge's order, stated for the opinion of the court:—

This action is brought to recover the sum of 100*l.* from the defendant, being 25*l.* claimed by the plaintiff as remaining unpaid in respect of each of the half-yearly payments of rent which respectively accrued due on the 29th of September, 1849, the 25th of March, 1850, the 29th of September, 1850, and the 25th of March, 1851; the plaintiff having received of the defendant the sum of 285*l.* for and on account of each of the said *half-yearly payments, without prejudice to his right to the said additional sum of 25*l.* so claimed by him as [*846] aforesaid, a question having arisen between him and the defendant as to the proper construction of the proviso for the increase or reduction of the rent set out in the declaration.

The 56th section of the tithe commutation act, 6 & 7 W. 4, c. 71, directs, that, in the month of January, in every year, the comptroller of corn returns for the time being, or such other person as may from time to time be in that behalf authorized by the privy council, shall cause an advertisement to be inserted in the London Gazette, stating what has been, during seven years ending on the Thursday next before Christmas Day then next preceding, the average price of an imperial bushel of British wheat, barley, and oats, computed from the weekly averages of the corn returns.

The following is a copy of the advertisement which appeared in the London Gazette of the 7th of January, 1849, in pursuance of that act.

“Return stating what has been, during seven years ending on the Thursday next before Christmas Day, 1848, the average price of an imperial bushel of British wheat, barley, and oats, computed from the weekly averages of corn returns.

“Published pursuant to an act passed in the sixth and seventh year of the reign of William the Fourth, intituled ‘An act for the commutation of tithes in England and Wales.’

Wheat.	Barley.	Oats.
s. d. 6 10½	s. d. 4 1½	s. d. 2 8½

“GEORGE JOYCE,

“Comptroller of corn returns

“Corn department, board of trade,

“January 3d, 1849.”

*847] *The following is a copy of the advertisement which appeared in the London Gazette of the 8th of January, 1850.

[In this return the average prices were as follows:—Wheat, 6s. 7½d., Barley, 4s. 1½d., Oats, 2s. 8½d.]

The average price of wheat during the year, 1849, calculated from the weekly returns of that year, was, 44s. 3d. per quarter.

The following is a copy of the said advertisement which appeared in the London Gazette of the 3d of January, 1851.

[In this return the average prices were as follows:—Wheat, 6s. 5½d., Barley, 4s., Oats, 2s. 8d.]

The average price of wheat during the year, 1850, calculated from the weekly returns of that year, was, 40s. 3d. per quarter.

The plaintiff contended that the average price of wheat, according to the meaning of the lease, was not under 48s. per quarter in the year 1850 and 1851; and therefore the rent of the premises for each year ending the 25th of March, 1850, and the 25th of March, 1851, was 620l.

The defendant contended that the average price of wheat in each of the years of the said term ending the 25th of March, 1850, and the 25th of March, 1851, according to the meaning of the lease, was under 48s. per quarter; and that the average price mentioned in the proviso, meant the average price in any *one* year of the term, and not the average price of *seven* years.

If the defendant's construction was correct, then the rent of the premises for the said two years ending the 25th of March, 1850, and the 25th of March, 1851, would have been 570l., which sum had been paid to the plaintiff as aforesaid.

The question for the opinion of the court, therefore, was,—whether the plaintiff's or the defendant's construction of the said lease was correct.

*848] *If the court should be of opinion in favour of the defendant's construction, then the plaintiff agreed that a judgment should be entered against him of *nolle prosequi* immediately after the decision of the case, or otherwise, as the court might think fit; but, if the court should be of the contrary opinion, then the defendant agreed that judgment should be entered against him by confession, for 100l. debt, immediately after the decision of the case, or otherwise, as the court might think fit, and that judgment should be entered accordingly.

Roebuck, for the plaintiff.—The average price of wheat, ascertained in the manner pointed out in this lease, was not under 48s. per quarter in the years 1850 and 1851. The average directed to be published in the Gazette by the 6 & 7 W. 4, c. 71, s. 56, is calculated upon the weekly returns required by the 9 G. 4, c. 60, s. 8, and is an average of *seven* years; and this is the average upon which the rent reserved by this indenture is to be ascertained. {JERVIS, C. J.—If you read

the proviso as referring to the average price of *one year*, it becomes an impossible condition; there are no means of ascertaining it. MAULE, J.—Strike out the words in the parenthesis, and then it would clearly be an average of *one year*.] No doubt; but there is no pretence for doing that. If this had been a term of one or two, or even five, years, there might be some hardship in the construction now contended for: but that argument fails in the case of a twenty-one years' term. The seven years' average affords the much more sedate and reasonable mode of estimating the rent. The proviso in the lease refers to a specific provision in the act of parliament; and, though the language may not be strictly accurate, it is plain enough to enable the court to see the intention of the parties.

Keating (with whom was *Taprell*), contra.—Taking *the whole [*849 deed together, it evidently was the intention of the parties that the rent should vary each year, according to the annual wheat average for that year. The reference to the statute certainly creates a little difficulty: but the real meaning is, that the year's average shall be ascertained in the same manner as the comptroller of corn returns, under the 6 & 7 W. 4, c. 71, s. 56, ascertains the septennial average. To give effect to the argument on the other side, there must be two averages taken in each year, because each year of the term commences and ends at Lady-Day. The average is to be of a current year of the term. The average up to Christmas, 1849, would be ascertained in January, 1850. [JERVIS, C. J.—In that case, the amount of the September rent would not be ascertained until January: that could not have been meant.] It is impossible to give effect to the words of the covenant, without holding it to mean the average of the year,—the average of the wheat sold in that year. [MAULE, J.—I should say it means the average ascertained each year in the way pointed out by the act referred to,—the average price settled in that year by the tithe-commissioners.] The intention of the parties would, it is submitted, be best effectuated by construing the covenant to mean, the average price ascertained in the same way that the tithe averages are taken.

Roebuck was heard in reply.

JERVIS, C. J.—I am of opinion that the plaintiff is entitled to the judgment of the court, the average price of wheat during the period in question not having been, according to the meaning of this covenant, under 48s. per quarter. As I read the proviso, it means this:—If the average price of wheat in any one year of the term shall be so and so, then the rent shall for that year be so much. And, in order to ascertain the average price, *they elect to have recourse to the annual [*850 returns under the tithe-commutation act, which returns are calculated upon an average of the seven years next preceding. That may not be the best mode of ascertaining it; but it clearly is the test they have thought proper to fix.

MAULE, J.—I am of the same opinion. The intention of the parties is, in my opinion, expressed with sufficient clearness. The rent for each year of the term after the first, is to be calculated according to the average price of wheat in that year,—that is, the thing which is published as an annual average under the authority of the tithe-commutation act, which we know is the result of seven years' sales. I think it is sufficiently apparent that the parties meant that the rent should fluctuate just as the tithe rent-charge fluctuates, viz., by the published return. That being the plain sense of the words used, whatever we might conjecture about the probable intention of the parties, even if we thought it was as Mr. *Keating* suggests,—of which I am by no means satisfied,—we are not justified in putting upon them a different construction, and one which is inconsistent with some of the words, and which could only be arrived at by rejecting them.

CRESSWELL, J.—I am of the same opinion. The parties have clearly agreed that the rent shall vary according to the published averages under the 56th section of the tithe commutation act.

WILLIAMS, J., concurred.

Judgment for the plaintiff.

*851] *SCHREGER v. CARDEN and Another. Jan. 13.

Payment of money into court in an action of tort, amounts to no more than an admission that the plaintiff has a *cause of action*, to the extent of the money paid in, from some wrongful act of the defendant, and does not necessarily admit that the latter is guilty of the wrongful act charged in the declaration.

THIS was an action of trespass against the sheriffs of London, for taking and detaining certain goods of the plaintiff, to wit, three cups, whereby the plaintiff was deprived of the same, and the same were damaged.

The defendants paid into court 10*l.*, averring that the plaintiff had not sustained damages to a greater amount in respect of the causes of action in the declaration mentioned.

To this the plaintiff replied damages *ultra*, upon which replication issue was joined.

The cause was tried before JERVIS, C. J., at the sittings in London after the last term. It was proved that one Sloman, a sheriff's officer, had seized a carved ivory cup belonging to the plaintiff. The cup which had been so seized was produced from an auction-room to which it had been removed, and it was proved to have received damage in the removal to an amount exceeding the sum paid into court.

No evidence was given to connect the defendants with the transaction: but the payment into court was relied on by the plaintiff as an admission which rendered such proof unnecessary.

For the defendants, *Story v. Finnis*, 6 Exch. 123,† was cited, where

it was held, that a general plea of payment of money into court in an action of tort, is a mere admission that the plaintiff has *some* cause of action, for which he is entitled to recover damages to the extent of the sum paid in; and, therefore, in an action on the case for pound-breach and rescue, where the defendants pleaded payment into court *of a certain sum, alleging that the plaintiff had not sustained any damages *ultra*, it was held that the plea did not admit either that the pound was the plaintiff's, or that the defendants had been guilty of the rescue. [*852]

Upon the authority of this case, his lordship nonsuited the plaintiff.

B. C. Robinson now moved for a new trial on the ground of misdirection.—The payment into court was a conclusive admission that the defendants were liable to some extent in respect of their being guilty of the trespass charged in the declaration. [JERVIS, C. J.—Does the payment into court fix the sheriffs with the identity of the article?] There was no suggestion that there was any other cup in dispute than the cup which was produced at the trial. *Story v. Finnis* was founded partly upon *Cook v. Hartle*, 8 Car. & P. 568,(a) which is virtually overruled by *Leyland v. Tancred*, 16 Q. B. 664 (E. C. L. R. vol. 71). There, a declaration in case against Tancred and Armitage, stated that the defendants wrongfully and injuriously seized goods of the plaintiff as a distress for rent, to wit, &c., then claimed and pretended by them to be due to Tancred; and afterwards, under that pretence, wrongfully sold the goods as such distress, &c.; whereas, a small part only of the amount claimed, was due, to wit, &c. The defendants paid 1s. into court, averring that the plaintiff had not sustained damages to a greater amount “in respect of the grievances and causes of action in the count mentioned.” It was held, that the payment into court admitted the sale as well as the seizure. *Lord CAMPBELL, in the course of the argument, observes,—“The payment into court implies that a joint wrong was committed, and affirms that the payment of 1s. covers it:” and, in giving judgment, he adds:—“Looking to the first count, we find that two wrongs are stated, distraining, and selling. *The payment of money into court admits both*: there was no need of further proof that Tancred was accessory to them. An action might have been brought for distraining only: but a subsequent wrong is alleged, and *admitted*.” [JERVIS, C. J.—Can you distinguish this case from *Story v. Finnis*.] No. But it is submitted that that case is inconsistent with *Leyland v. Tancred*, which was not cited there. [JERVIS, C. J.—In *Leyland v. Tancred*, the Court of Queen's Bench refused the rule: [*853]

(a) In that case it was held, that, if, in trover, the declaration enumerates a great number of articles, and the defendant pays money into court, and pleads that the plaintiff has sustained no greater damages, the plaintiff must show what articles the defendant has converted; and, a declaration in trover being general, the defendant, by this plea, does not admit anything beyond his payment into court.

in *Story v. Finnis*, the matter was fully discussed, and the Court of Exchequer took time to consider.] In *Lloyd v. Walkey*, 9 C. & P. 771 (E. C. L. R. vol. 38), in an action for negligence, in not properly securing a cow of the defendant in a slaughter-house, the declaration stated, that, by means of the premises, the cow ran at, killed, and destroyed a cow of the plaintiff. The defendant pleaded payment of 30s. into court, and averred that the plaintiff had sustained no greater damages: and COLERIDGE, J., refused to receive evidence that the death of the cow was caused by other means than those stated in the declaration, because he thought that the plea admitted that the death of the cow was caused in the manner stated in the declaration. Here is but one substantive allegation, as to one specific fact. It is not like the case of an *indebitatus* count, where there may have been dealings under twenty different contracts.

MAULE, J.—The case of *Story v. Finnis* is admitted to be perfectly *854] in point, where the Court of Exchequer, *after argument, and after time taken for deliberation, pronounced a judgment which, according to the impression on my mind, is the result of the authorities for many years past. They say: “We are all clearly of opinion that the payment of money into court, in the case of a tort, is not similar to the payment of money into court in the case of a special contract. It has long since been settled, that the payment of money into court on a general *indebitatus* count, really admits nothing more than that a cause of action exists, with damage to the extent of the amount paid into court; and we think the same principle applies to the case of a wrong.” That being an express decision subsequent in point of date to *Leyland v. Tancred*, and being more deliberate, and conformable to what I conceive to be the correct rule of law, I think we shall do well not to allow it to be disturbed, and to refuse this rule. The admission by payment into court in an action of tort, is something analogous to the admission by payment into court in *indebitatus assumpsit*. The effect is rather this,—the defendant says he will not dispute what is alleged against him in the declaration, to the extent of 10*l.*; leaving the plaintiff all his rights *extra* the 10*l.*, and not prejudicing himself as to his defence *ultra* that sum. The rule may very well apply to torts to personal chattels. Here, the payment into court does not operate as an admission that the cup produced was the cup which the defendants admit they have damaged to the extent of 10*l.* If the payment into court were to have the effect contended for by the plaintiff, the consequence would be, that he would entitle himself to succeed, by producing *any* cup, and showing it to have been deteriorated to a greater amount than 10*l.* I cannot think that payment into court has, or ought to have, that consequence. I am well satisfied with the law laid down in *Story v. Finnis*, and cannot agree with that *855] suggested in *Leyland v. Tancred*. I therefore think this rule should be refused.

CRESSWELL, J.—I am of the same opinion. *Story v. Finnis* is quite in point, and is more in conformity with principle than the conflicting decision of the other court.

WILLIAMS, J.—I am also of opinion that *Story v. Finnis* was well decided. Payment of money into court here clearly did not amount to an admission that *any* cup which the plaintiff might choose to produce at the trial, was the cup which was the subject of the action.

JERVIS, C. J., concurred.

Rule refused.(a)

(a) See the next case.

PERREN v. THE MONMOUTHSHIRE RAILWAY AND CANAL COMPANY. May 9, 1853.

Payment of money into court upon a *general count in indebitatus assumpsit*, or in *debt*, admits only a cause of action to the amount paid into court, and operates as an admission for no other purpose.

Payment of money into court upon a declaration on a *special contract*, admits the contract and the breach.

Payment of money into court in actions of *tort*, may, according to the form of the declaration, be subject either to the rule applicable to special contracts, or to the rule applicable to general *indebitatus* counts: thus, where the declaration is *general and unspecific*, the payment into court admits a *cause of action*, but not *the cause of action sued for*: on the other hand, if the declaration is *specific*, the payment into court admits the cause of action so specifically stated.

In case against a railway company, for negligence, whereby the plaintiff, a passenger, was injured, the defendants pleaded payment into court of 25*l.*, and no damages *ultra*:—Held, that the payment into court admitted the contract to carry, and the breach of the duty founded upon that contract, so as to dispense with proof of negligence,—the damages being single, and depending upon nothing beyond the mere breach of duty admitted.

THIS was an action upon the case against a railway company, for alleged negligence.

The declaration stated, that, before and at the time of the *com- [*856
mitting of the grievances thereafter mentioned, the defendants
were, and still are, the owners and proprietors of a certain railway, in
the county of Monmouth, called The Western Valleys Railway, and of
certain carriages used by them for the conveyance of passengers along
the said railway for hire and reward in that behalf; and that thereupon
the plaintiff, theretofore, to wit, on the 10th of August, 1852, at the
request of the said company, became and was a passenger in one of
their said carriages, to be by them safely conveyed along the said rail-
way from Newport, in the county aforesaid, to Ebbw Vale, in the county
aforesaid, for reward to the defendants in that behalf; yet that the
defendants did not nor would use due care in that behalf, by reason
whereof, and of the carelessness and default of the defendants, by their
servants, whilst the plaintiff was such passenger in such carriage as
aforesaid, the said carriage in which the plaintiff was riding, was sud-
denly thrown off the line of railway, and cast against a stone wall near
the rail line, and the plaintiff was thrown with great force against the

said wall, and was otherwise greatly bruised and injured, and so remained from thence hitherto; and thereby the plaintiff, during all that time, was prevented from carrying on and transacting his lawful and necessary affairs, and also his business of a hay and corn dealer, and in consequence thereof lost and was deprived of divers gains and profits which otherwise might and would have accrued to him; and thereby also the plaintiff was necessarily subjected to and incurred divers expenses, to wit, to the amount of 20*l.*, in medical attendance, in respect of such injuries,—“and the plaintiff claims 1000*l.*”

Plea,—“The defendants, by L. F. W., their attorney, bring into court the sum of 25*l.*, and say that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.”

*857] *Replication,—“The plaintiff says that the sum of 25*l.* paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded.”

“The defendants join issue upon the plaintiff’s replication.

The cause was tried before WILLIAMS, J., at the last assizes at Gloucester. It appeared that the plaintiff was a passenger, on the day mentioned in the declaration, by the defendant’s railway; and that the train was proceeding at the rate of fifteen miles an hour, when, from some unexplained cause, the carriage in which the plaintiff was, went off the line, and the plaintiff, whose head was out at the window at the moment, was considerably injured. There was no complaint as to the insufficiency of the engine or of the rails; nor the slightest suggestion of negligence on the part of the defendants, beyond the mere fact of the accident having happened.

On the part of the defendants, it was submitted, that the plaintiff was bound to *prove* negligence, as alleged in the declaration.

For the plaintiff it was insisted that the negligence was admitted by the payment of money into court.

In answer to this, the case of *Story v. Finnis*, 6 Exch. 123,† was cited.

The learned judge left it to the jury to say,—first, whether the accident was attributable to the carelessness of the company or their servants,—secondly, whether, if so, the sum paid into court was a sufficient compensation; and reserved leave to the defendants to move to enter a nonsuit, if the court should be of opinion that proof of actual negligence was necessary.

The jury having returned a verdict for the plaintiff, for 25*l.* beyond the sum paid into court,

*858] **Whateley*, on a former day, obtained a rule nisi to enter a nonsuit pursuant to the leave reserved.—He referred to *Story v. Finnis*, 6 Exch. 123,† and *Schreger v. Carden*, antè, p. 851. [CRESSWELL, J., referred to *Knight v. Egerton*, 7 Exch. 407,† where, the defendant having pleaded payment into court upon counts in case for

an excessive distress, and for selling the goods distrained without having duly appraised the same,—the court said “that the plea of payment into court was a conclusive admission that there was a sale without the goods having been duly appraised; and that it was the duty of the judge to inform the jury what was the true measure of damages on that issue, whether the point was taken or not.”]

Allen, Serjt., and *Smithies*, showed cause.—There was ample evidence of negligence, to warrant the finding of the jury: the mere fact of the accident having occurred was *prima facie* evidence of negligence to call on the defendants for an answer: *Christie v. Griggs*, 2 Camp. 79; *Carpue v. The London and Brighton Railway Company*, 5 Q. B. 747 (E. C. L. R. vol. 48), 1 D. & M. 608; *Skinner v. The London, Brighton, and South Coast Railway Company*, 5 Exch. 787.† [JERVIS, C. J.—In all these cases, there was *some* evidence of negligence.] Not of specific negligence. But, here, negligence is conclusively admitted by the payment of money into court: *Leyland v. Tancred*, 16 Q. B. 664 (E. C. L. R. vol. 71); *Knight v. Egerton*, 7 Exch. 407.† It admits every allegation that is essential to sustain the action to the extent of the payment. In an action of this sort, negligence is the gist of the action, and therefore is necessarily admitted. *Schreger v. Carden*, *antè*, p. 851, was a different case: that was a mere question of identity; there was no evidence that the cup produced at the *trial was the cup taken. [JERVIS, C. J.—If payment of money into court [*859 in an action of tort, is to operate simply as in *indebitatus assumpsit*, viz. as striking so much out of the declaration, there will be no means, in an action of tort, of saving the expense of going down to trial: the defendant must pay all the expenses of the witnesses to prove negligence. WILLIAMS, J.—The point was not settled in *indebitatus assumpsit*, without a great deal of controversy, and overruling one or two cases.] *Leyland v. Tancred* is precisely in point, and *Story v. Finnis* and *Schreger v. Carden* are distinguishable.

Whateley and *Gray*, in support of the rule.—In order to sustain an action of this sort, some negligence on the part of the defendants must be proved. In *Christie v. Griggs*, the breaking down of the coach was *prima facie* evidence that it was unfit to carry the load. So, in *Carpue v. The London and Brighton Railway Company*, and *Skinner v. The London, Brighton, and South Coast Railway Company*, there was strong evidence of negligence. Here, however, there was no suggestion that the accident might by any precautions have been prevented. Again, in *Piggot v. The Eastern Counties Railway Company*, 3 C. B. 229 (E. C. L. R. vol. 54), there was evidence, that, by adopting certain precautions, the emission of sparks from the engine might have been prevented. Then, what is the effect of the payment of money into court? Is it such a conclusive admission of the negligence charged in the declaration, as to relieve the plaintiff from all proof of negligence? Suppose the

defendants had suffered judgment by default, would the plaintiff have been entitled to more than nominal damages, if he gave no evidence of negligence? PARKE, B., in *Story v. Finnis*, holds that he would not. In *Kingham v. Robins*, 5 M. & W. 94,† where the matter was very *860] elaborately discussed, and *Meager v. *Smyth*, 4 B. & Ad. 673, (E. C. L. R. vol. 24), 1 N. & M. 449 (E. C. L. R. vol. 28), overruled, it was held that a plea of payment of money into court under the general indebitatus counts, only admits a liability upon some one or more contracts to the extent of the sum paid in. And there can be no reason for carrying the doctrine any further in an action of tort. Actions of tort are now put expressly upon the same footing. In *Cox v. Parry*, 1 T. R. 464, it was held, that payment of money into court is only an acknowledgment by the defendant of the contract, and that the plaintiff is entitled to recover the sum so paid; but it does not preclude him from taking any objection to the action beyond that sum. [JERVIS, C. J., referred to *Ravenscroft v. Wise*, 1 C. M. & R. 203,† 4 Tyrwh. 741, 2 Dowl. P. C. 676. *Leyland v. Tancred* is distinctly overruled by *Schreger v. Carden*, ante, p. 851, which amounts to a positive decision that the rule in tort is the same as in indebitatus assumpsit. [JERVIS, C. J.—The principle of *Story v. Finnis* applies to this case; but the circumstances are different.] The payment of money into court here admits, that, on some occasion, there was negligence on the part of the defendants, but not on the precise occasion in question. The plaintiff was bound to prove, that, upon an occasion upon which the defendants were guilty of negligence, he sustained damage to an amount exceeding the sum paid into court. Suppose the plaintiff has upon two occasions travelled upon the defendants' railway, and met with an accident on each occasion, the one a severe, the other a trifling one,—who is to say in respect of which the defendants have paid money into court? and, for which are the jury to give damages? [WILLIAMS, J.—In an action for crim. con., suppose the defendant suffers judgment by default, must you still prove the adultery?] The judgment by default admits the *861] adultery charged in the declaration. *[CRESSWELL, J.—Suppose the plaintiff has had two wives within the period of limitation, and the defendant has been guilty of adultery with both?] In the case of a libel, by letting judgment go by default, the defendant admits the publication. [JERVIS, C. J.—The effect of payment into court in the case of a special contract, is now settled; its effect in indebitatus assumpsit is also settled, but in a different way: the question is, how does it operate in an action of tort? There is a case in the Exchequer each way, a case in the Queen's Bench one way, and another in this court the other way; but this latter is reconcileable upon the doctrine of identity. WILLIAMS, J.—The only objection at the trial, was, that there was no evidence of negligence: the question of identity was not raised. In *Schreger v. Carden*, it was put upon the doctrine laid down in *Story v.*

Finnis. If that be the true principle, the question of identity does not arise.] In *Knight v. Egerton*, the point was not taken: and the court could never have intended to overturn their previous considered judgment, without at all alluding to it. [CRESSWELL, J.—Suppose the defendants had pleaded that the plaintiff was not a passenger, and he proved at the trial that he was a passenger, and that he received an injury,—must he go to prove negligence?] Clearly he must, to entitle himself to more than nominal damages. [CRESSWELL, J.—That would be making the plea equivalent to not guilty.] *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court.—This is an action for negligence; to which the defendants paid money into court: and the question is, what is the effect of such payment. Another question was also raised, upon the sufficiency of the evidence to prove negligence, if proof of negligence was, under the *circumstances, [*862 necessary. But, in the view we take of the case, that question becomes immaterial; because we think that the plaintiff is entitled to retain his verdict, upon the first point.

The authorities upon the subject are apparently conflicting; but we think they can be reconciled; and, at all events, there is no case which conflicts with our decision in favour of the plaintiff.

Although it was at one time doubted, it is now clearly settled, that payment of money into court upon a general count in indebitatus assumpsit, or in debt, admits only a cause of action to the amount paid into court, and no more; and that the admission can operate for no other purpose: *Kingham v. Robins*, 5 M. & W. 94;† *Stapleton v. Nowell*, 6 M. & W. 9,† 8 Dowl. P. C. 196.†(a) The reason for this rule is clear and satisfactory. An indebitatus count is not confined to one contract, but may extend to an indefinite number of contracts between the parties. When, therefore, the defendant pays money into court upon such a count, he in effect says, I admit that I owe you the sum paid into court upon some contract which may be comprehended in your count; but, if you say I owe you more upon any contract, prove that contract. For the same reason, payment into court by several defendants sued jointly on a general count, does not admit the partnership, because it merely admits that there was a partnership in some contract within the declaration, to the amount paid into court; and, if the plaintiff wishes to recover more, he must prove a contract in which they are jointly liable for a larger amount. So, with respect to payment of money into court to a declaration upon a special agreement, the rule is clear; and the reason for the rule is satisfactory. Payment of money into court under such circumstances, admits the contract *and the breach: *Fisher v. Aide*, 3 M. & W. 486.† The reason [*863 for this rule is, that, as the declaration contains but one con-

(a) And see *Archer v. English*, 1 M. & G. 873 (E. C. L. R. vol. 39), 1 Scott, N. R. 156, 9 Dowl. P. C. 21.

tract, the payment into court must admit that contract by which alone anything is claimed to be due from the defendant to the plaintiff.

Formerly, it was supposed by the profession, that, by payment of money into court in an action of tort, the defendant admitted the cause of action sued for; and that, as the plaintiff was at liberty to prove any cause of action he pleased consistent with the declaration, it was the duty of the defendant to take care, by the form of his pleading, or by obtaining particulars on summons, that his admission by payment into court was not used to his prejudice.

Of late years, this rule has been greatly modified. In *Story v. Finnis*, 6 Exch. 123,† the plaintiff declared for a pound-breach and rescue; the defendants paid money into court; and the Lord Chief Baron, being of opinion at the trial that there was no evidence of a pound-breach, or of a rescue by the defendants, entered a verdict for the defendants, which the court *in banc* upheld; being of opinion that the payment of money into court in the case of a tort was not similar to the payment of money into court in the case of a special contract; but that, like the case of payment of money into court on a general indebitatus count, it really admits nothing more than that a cause of action exists, with damage to the amount paid into court.

We cannot assent to the generality of this proposition. In some cases, in tort, the declaration may be so framed as to make a payment of money into court an admission of the particular cause of action sued for, and also of the breach. In our opinion, the payment of money into court in actions of tort, may, according to the form of the declaration, be subject either to the rule applicable to special contracts, or to the rule applicable to general indebitatus counts. For instance, in *864] *Story v. Finnis*, if the declaration had described a particular pound, the payment of money into court would have admitted the breach of that pound; because, as the plaintiff rested his action solely upon the breach of a particular pound, nothing could be due from the defendants to him, unless they admitted the breach of that particular pound upon the breach of which alone he claimed damages: but, notwithstanding this, the judgment would still have been right, because, as the amount of damages depended upon the number and value of the goods rescued, the plaintiff was bound to prove a rescue by the defendants to an amount exceeding the sum paid into court. On the other hand, if the description in the declaration did not apply to any particular pound, then, in our opinion, the judgment was right upon both points, because, in that case, it would to a certain extent be like the case of payment of money into court upon a general indebitatus count. We read the judgment of the court with reference to the subject under discussion, and, presuming that the count did not describe a particular pound, subscribe to the doctrine there laid down.

The next case is *Leyland v. Tancred*, 16 Q. B. 664 (E. C. L. R. vol.

71). There, the plaintiff complained of a distress for more rent than was due; and, the defendants having paid money into court, it was holden that the distress and wrongful sale were admitted by such payment. The declaration particularly described the subject-matter of the plaintiff's complaint and claim; and the payment into court admitted that claim, for the reasons which we have given, and reduced the question to one of damages only,—subject, of course, to the observation, that, as the amount of damages depended upon the number and value of the goods sold, it was necessary to prove what goods were sold under a distress by the defendants, in order to obtain a verdict *above the sum paid into court. Story v. Finnis was not cited in this [*865 case; and the point now adverted to does not seem to have occurred to the court or to the counsel engaged in the discussion.

In the next reported case,—Schreger v. Carden, antè, p. 851, this court acted upon the case of Story v. Finnis. That was an action of trespass for taking and damaging the plaintiff's cups, to which the defendant paid 10*l.* into court. At the trial, a cup was produced from an auction-room, which was proved to have been damaged more than 10*l.*; but there was no proof that this cup was the cup which the defendant had taken. Under these circumstances, I nonsuited the plaintiff; and the court held my ruling right, and to that extent acted upon and confirmed the case of Story v. Finnis.

The only remaining case is that of Knight v. Egerton, 7 Exch. 407.† To a count for selling the plaintiff's goods without having them duly appraised, the defendant paid money into court; and “the court said that the plea of payment into court was a conclusive admission that there was a sale without the goods having been duly appraised.” The Court of Exchequer do not seem to have adverted to their own decision in Story v. Finnis, and for the moment lost sight of the fact, that, inasmuch as the amount of the damages in Knight v. Egerton depended upon the number and value of the goods sold without appraisement, it was necessary to prove a sale by the defendants without appraisement, of all the goods in respect of the claim, notwithstanding that the payment into court admitted that some goods were sold by the defendants without appraisement. But, in truth, the point was not brought prominently before the court.

Upon a review of these cases, we think that, where, in an action of tort, the declaration is general and *unspecific, the payment of money into court, though it admits a cause of action, does not [*866 admit the cause of action sued for; and that the plaintiff must give evidence of the cause of action sued for, before he can have larger damages than the amount paid into court. On the other hand, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant, unless the defendant admitted the particular claim made by the declaration, we think that the payment of money into court admits the

cause of action sued for and so stated in the declaration. If the breach is single, and the damages entire, then, of course, it becomes, under such circumstances, a mere question of damages; but, if the damages may be compounded of several things,—for instance, as in the case of *Story v. Finnis*, of the number and value of the goods taken, then, although the payment of money into court may from the form of declaration admit the particular cause of action sued for, still it may be necessary to prove the cause of action, with a view to the damages, because, although the defendant would thus admit that he broke a particular pound, he would not admit, that, as the result of that particular breaking, he rescued all the goods in respect of which damages were claimed.

Applying these principles to the present case, we think that this rule ought to be discharged. The declaration states a contract to carry the plaintiff from Newport to Ebbw Vale, and a negligent breach of duty in the performance of that contract, by which the plaintiff sustained injury. The payment into court admits the contract to carry. In this respect, it is like the payment of money into court upon a special agreement. It also admits a breach of the duty founded upon that contract. But the damages resulting from this admitted breach are single, and depend upon something beyond the mere breach of duty admitted. It becomes, *867] therefore, in this *case a pure question of damages; and the plaintiff was on no account obliged to give evidence of negligence.

For these reasons, we think that the rule should be discharged.

Rule discharged.

Spalding v. Vandercook, 2 Wend. 431; *Johnston v. Columbian Ins. Co.*, 7 Johns. 315; *Bank of Columbia v. Sutherland*, 3 Cowen, 3

OVERTON v. FREEMAN and Another. Jan 13.

A. contracted with parish officers to pave a certain district, and entered into a sub-contract with B., under which the latter was to lay down the paving of a street, the materials being supplied by A., and brought to the spot in his carts. Preparatory to the paving, the stones were laid, by labourers employed by B., on the pathway, and there left unguarded at night, in such a manner as to obstruct the same, and C. fell over them, and broke his leg:—Held, that B. was responsible for this negligence, and not A.

THIS was an action upon the case. The declaration stated, that, before and at the time of the committing of the grievances thereafter mentioned, to wit, on, &c., and from thence hitherto, there was, and still is, a common public street and highway for all persons to pass and repass on foot, at their free will and pleasure, to wit, at Grove Street, &c. &c.: yet that the defendants, well knowing the premises, negligently, wrongfully, and injuriously put and placed divers large quantities of stone in the said street, and negligently, wrongfully, and injuriously

continued the same stone therein during the night time of that day, without placing or causing to be placed any light or signal near such stone, to denote that the same was there, the night being dark, and requiring such light or signal for the safety of all persons passing through such public street and highway: By means of which negligence of the defendants, the plaintiff afterwards, in the night time of the said day, then and there passing on foot with great and proper care through the said street, fell upon the said stone, and was thereby greatly hurt, and his leg was wounded and broken, and was afterwards amputated, &c.

Plea, not guilty.

The cause was tried before JERVIS, C. J., at the sittings in Middlesex after last term. The defendants, it appeared, had contracted to pave certain portions of the *parish of St. Pancras, and entered into [*868 a sub-contract with one Warren to lay down the kerb-stone in Grove Street, under the superintendence of the surveyor of the local commissioners. The plaintiff proved, that, on the evening of the 18th of December, 1850, he had been attending a lecture at a public-house called the King's Head, and that, in crossing over from that place, between ten and eleven o'clock at night, at the corner of Grove Street, he fell over some paving-stones which had been laid on the pathway, and broke his leg, and was afterwards obliged to have it taken off. Warren, who was called as a witness for the plaintiff, stated that he had contracted to lay down the kerb for the defendants; that the stones were supplied by the defendants, and brought to Grove Street in their carts; and that the labourers who placed the stones on the pathway were employed and paid by him, the witness

His lordship nonsuited the plaintiff, holding that the defendants, not being shown to have been parties to the act which occasioned the injury, were not liable.

Stammers now moved for a new trial, on the ground of misdirection.—The plaintiff was taken by surprise at the trial, when he found that Warren, whom he had supposed to be the defendants' foreman, proved that he was a sub-contractor, and not a mere servant. It is submitted, however, that the only effect of that, under the circumstances, would be, to make him liable, as well as the defendants. The injury of which the plaintiff here complains being the result of a *public* nuisance, the case is taken out of the rule which has prevailed in some of the cases, where it has been held that the sub-contractor *only* was liable. Whoever contributes in any degree to the wrong is responsible for it. That this is a public nuisance, is clear, from 1 Russell on Crimes, 3d edit., 347, where it is said: "There is no doubt but that all injuries *whatsoever to a highway, as, by digging a ditch, or making a [*869 hedge across it, or laying logs of timber in it, or doing any other act which will render it less commodious to the King's subjects, are

public nuisances at common law.”(a) [MAULE, J.—Nobody doubts that: the only question here is, who committed the nuisance?] If any person contracts with another to perform work, and in the course of doing it a nuisance is created, the employer is liable, and not merely the hand that did it. And one who sustains a particular injury or damage from a public nuisance may have an action: per Lord ELLENBOROUGH, in *The King v. Dewsnap*, 16 East, 194; *Duncan v. Thwaites*, 3 B. & C. 556, 584 (E. C. L. R. vol. 10), 5 D. & R. 447. Here, the defendants were at all events contributory to the act: the stone was supplied by them, and brought in their carts. In *Bush v. Steinman*, 1 Bos. & P. 404, A., having a house by the roadside, contracted with B. to repair it for a stipulated sum; B. contracted with D. to do the work, and C. with D. to furnish the materials. The servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff’s carriage was overturned: and it was held that A. was answerable for the damage sustained. This has been supposed to have been overruled by a passage contained in the judgment of the Court of Exchequer in *Reedie v. The London and North Western Railway Company*, 4 Exch. 244, 256;†(b) but that is not the fair result of *870] the whole judgment. In *Burgess v. Gray*, 1 C. B. 578 (E. C. L. R. vol. 50), the owner of a house, under circumstances very similar to those in *Bush v. Steinman*, was held responsible for the negligence of persons employed by one who had contracted for the repair of the house; TINDAL, C. J., putting it upon the ground that the act was in some degree sanctioned by the defendant. And this is consistent with the doctrine laid down by PARKE, B., in *Quarman v. Burnett*, 6 M. & W. 499.† [WILLIAMS, J., referred to *Knight v. Fox*, 5 Exch. 721.† A railway company entered into a contract with A. to construct a portion of their line: A. contracted with B., who resided in the country, to erect a bridge on the line: B. had in his employment C., who acted as his general servant and as a surveyor, and had the management of B.’s business in London, for which he received an annual salary: B. entered into a contract with C., by which C. agreed for a given sum to erect a scaffold, which had become necessary in the building of the bridge; but it was agreed that B. should provide the requisite materials, and lamps and other lights: the scaffold was erected upon the footway by C.’s workmen, and a portion of it improperly projected, owing to which, and to the want of sufficient light, D. fell over it at night, and was injured: after the accident, B. caused other lights to

(a) 1 Hawk. P. C., Ch. 76, § 144.

(b) There, a company empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors’ workmen for incompetence. The workmen, in constructing a bridge over a highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him: and it was held, in an action against the company, by the administratrix of the deceased, that they were not liable; and that, in such case, the terms of the contract in question did not make any difference.

be placed near the spot, to prevent a recurrence of similar accidents: and it was held, that an action was not maintainable by D. against B. for the injury thus occasioned.] In *Matthews v. The West London Water Works Company*, 3 Campb. 403, it was held that an action on the case lay against an incorporated water works company, where workmen employed by persons who contracted with the company to lay down pipes for conducting water through a public street did the work in a negligent manner, whereby an individual passing along the street received an injury. That case is precisely in *point: and upon [*871 its being cited in *Rapson v. Cubitt*, 9 M. & W. 710,† Lord ABINGER said: “There, the defendants *caused* their sub-contractor to commit a *public nuisance*.” *M’Laughlin v. Pryor*, 4 M. & G. 48 (E. C. L. R. vol. 43), 4 Scott, N. R. 655, goes much farther than it is necessary to go here: according to that case, all the parties would be liable in *trespass*. [JERVIS, C. J.—PARKE, B., in *Knight v. Fox*, explains what ROLFE, B., says about *Bush v. Steinman*, in the case of *Reedie v. The London and North-Western Railway Company*.]

MAULE, J.—The defendants in this case, it appears, had contracted to pave certain portions of the parish of St. Pancras, and entered into a sub-contract with one Warren, who was called as a witness, to pave the street in question. Warren employed labourers to work under him; and certain kerb-stones were so placed on the pathway by these men as to obstruct the same and to constitute a public nuisance, in consequence of which the plaintiff fell over them, and sustained an injury, for which an action is clearly maintainable against some one. The question is, whether the present defendants are the proper persons to be made responsible for this wrong. It is said that they having committed a public nuisance, and the plaintiff having therefrom sustained a particular injury, they are liable to him for compensation. No doubt, if the defendants were guilty of the wrongful act from which the injury to the plaintiff resulted, that would be so. But the question is, whether they are so identified with the persons who actually did it, viz., the labourers employed by Warren, as to make it their act. It is urged by Mr. *Stammers* that the defendants are liable in respect of this being a public nuisance; and it is insisted that there is some greater degree of liability in respect of this being a public wrong, than would ordinarily attach in the case of a mere private injury. I do *not, however, perceive [*872 that there is any distinction between the two which is at all favourable to the plaintiff’s argument. I rather think the liability for a public wrong is less extensive than the civil liability. A man is often civilly liable where no wrong was intended. I can find no case in which a party situated like these defendants are, has been held liable under circumstances like those of the present case, except the case of *Matthews v. The West London Water Works Company*, 3 Campb. 403, where it appears a verdict was obtained ~~against~~ a water works company

take the steps necessary to make their rule available. [JERVIS, C. J.—Why does not the plaintiff reduce? it will be less expensive than this rule.] If the plaintiff reduces, he must summon the jury, *and pay them*. [JERVIS, C. J.—You will get the costs if you succeed.] The defendants may be insolvent. [JERVIS, C. J.—We cannot speculate upon that.] In *Devanoge v. Borthwick*, 2 L. M. & P. 277, a rule like that now prayed was granted, the only difference between that case and the present being, that there the defendant had not nominated. [MAULE, J.—That makes all the difference.]

Per curiam.—There is no pretence for this application. The rule for a special jury having been duly obtained, and the jury nominated, the proper course is for the plaintiff to reduce. Rule refused.

*876] *MAGNUS and Others v. BUTTEMER. Jan. 29.

Damage resulting from the ship's taking the ground on the falling of the tide, in a tide harbour, in a spot where she is properly placed for the purpose of unloading, is not a stranding within the ordinary terms of a policy of insurance.

THIS was an action of assumpsit on a policy of assurance on the ship *Elizabeth*, for twelve calendar months, in port or at sea, in all services, in the coast and coasting trade of the united kingdom.

The declaration stated, that, during the time covered by the policy, and while the ship was in service in the coasting trade in the united kingdom, with a cargo of timber on board, by the said ship taking the ground, and by and through the hardness and unevenness of the ground, and the perils and dangers of the seas, the ship was strained, broken, damaged, and injured; and that an average loss was thereby incurred of 19*l.* 19*s.* 7*d.* per cent.

Pleas,—non assumpsit, and a denial of the loss in manner and form as alleged.

Issue being joined, and the cause ripe for trial, it was agreed that the captain and mate of the *Elizabeth* should be examined *viva voce* before one of the masters of this court, and that the facts disclosed on such examination should be stated in a special case for the opinion of this court. The material facts were as follows:—

The *Elizabeth* sailed from Rochester to Sunderland. On her arrival at Sunderland, the vessel went up the river abreast of Laing's ship-yard. She had to wait four or five days before she could go in to discharge. She was moored head and stern, and floated when the tide was in, and was aground, but not dry, at low water. She took three days to discharge. The beach was hard, shingly, and steep. When the vessel took ground, she listed towards the beach about two planks. When the

first tide was ebbing, a creaking noise was heard as she *took the ground, and it occurred when she floated again. This happened [*877 every tide, and sounded as if something was breaking. The cabin door, which would open and shut freely when the vessel was afloat, would not do so when she was aground. After first lying on the beach the vessel made more water than usual. The mate saw that she was "hogged," after having taken the ground. He observed that some of the trenails had started, and that some of the planks had left the trenails.

The question for the opinion of the court, was, whether, under these circumstances, there was a loss by perils of the seas.

Tomlinson, for the plaintiffs.—The facts stated in the case disclose a loss by a peril insured against. The vessel was unloading in the ordinary manner, and at an ordinary place, when the stranding took place. *Fletcher v. Inglis*, 2 B. & Ald. 315, is not to be distinguished from this case; the facts are almost identical. In that case, a transport in government service, was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was hard and uneven, and, on the tide leaving her, she received damage by taking the ground; and it was held that this was a loss by peril of the sea. That case was recognised in *Phillips v. Barber*, 5 B. & Ald. 161 (E. C. L. R. vol. 7). [CRESSWELL, J.—*Phillips v. Barber* was not a case of loss by a peril of the sea. MAULE, J.—In *Fletcher v. Inglis*, there was a loss by a peril of the sea. Here, however, nothing happened that was extraordinary or unexpected; the ship took the ground as she naturally would in a tide-harbour. In *Bishop v. Pentland*, 7 B. & C. 219 (E. C. L. R. vol. 14), 1 M. & R. 49 (E. C. L. R. vol. 17), a ship having goods on board which were insured, but warranted free from average, unless general, or the ship should be stranded, was compelled, in the course of her voyage, to *put into a tide-harbour, and was there moored alongside a quay, [*878 in the usual place for ships of her burden. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over, upon the tide leaving her. The rope with which she was so fastened, not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side, and was thereby stove in, and greatly damaged: and it was held that this was a stranding within the meaning of that word in the policy, although the stranding might have been occasioned remotely by the negligence of the crew, in not providing a rope of sufficient strength to fasten the ship to the shore. There, the damage was the result of an accident. But, taking the ground under such circumstances as are stated here, is hardly a peril of the sea.] The cause of damage was very similar to what was held, in *Devaux v. J'Anson*, 5 N. C. 519, 7 Scott, 517, to be a loss by a peril of the sea.

James Wilde, contra.—The damage sustained by this vessel was not the result of a peril which the underwriter insures against: it arose

solely from the weight of the vessel, when loaded, pressing and resting upon a hard and uneven beach. In Kent's Commentaries, the learned commentator, in describing what are "perils of the sea," says:(a) "Those words apply to all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist. *Quod fato contingit, et cuivis patrifamilias, quamvis diligentissimo possit contingere.* The imprudence, or want of skill in the master, may have been unforeseen, but it is not a fortuitous event. The underwriter undertakes only to indemnify against extraordinary perils of *879] *the sea, and not against those ordinary ones to which every ship must inevitably be exposed." In Stevens on Average,(b) after speaking of those injuries to a ship which do not come within the description of particular average, the author says: "Having thus stated what is particular average, it may perhaps be useful to state what is not. It is not customary to consider the repairs of the ship, in consequence of springing a leak at sea, as a claim for which the underwriters are liable; for, in all cases of particular average, the *onus* is thrown on the assured (the owner of the ship). It is not for the insurer to account for the cause of the accident. The assured must show that the damage for which he has a claim is the *direct* effect of a fortuitous accident. *In the absence of such proof*, the springing a leak is to be attributed either to the working and straining of the vessel,—which is the wear and tear of the voyage; or to some insufficiency or inherent defect; for neither of which are the underwriters liable. But, where the evidence derived from the log-book, and confirmed by the mariners, is sufficiently clear to show that the leak was occasioned by a stroke of the sea; for instance, when a ship has been suddenly thrown on her beam-ends, and immediately on her righting, it is discovered that she has sprung a leak, there is no doubt this comes under the head of a partial loss for which underwriters are liable." So, in Park on Insurance,(c) it is said, that, "where it is certain, that, in the ordinary course of the navigation, the vessel would, by the flux and reflux of the tide, be left on the mud, it was held that this was not a stranding within the meaning of that term in the policy." Carruthers v. Sydebotham, 4 M. & Selw. 77, and Rayner v. Godmond, 5 B. & Ald. 225 (E. C. L. R. vol. 7), were both cases of accidental damage. And in Bishop v. Pentland, 7 B. & C. 219 (E. C. L. R. vol. 14), 1 M. & R. 49 (E. C. L. R. vol. 17), *880] *LITTLEDALE, J., takes the distinction expressly: he says,— "where a vessel is on the ground or strand, in such a situation as she *ought not to be in* while prosecuting the voyage on which she is bound, *that* is a stranding within the meaning of the policy." In Fletcher

(a) 3 Kent's Comm. 300.

(b) 4th edit. p. 150.

(c) 8th edit. p. 240, citing Hearne v. Edmunds, 1 Brod. & B. 388 (E. C. L. R. vol. 5), 4 J. B. Moore, 15 (E. C. L. R. vol. 16).

v. Inglis, 2 B. & Ald. 315, there were two things which might have occasioned the damage,—the taking the ground on the receding of the tide,—and the bumping which was consequent on the swell: the court do not say on which ground their decision proceeded; but it is evident it must have been the latter. In *Devaux v. J'Anson*, 5 N. C. 519, 7 Scott, 517, the statement in the declaration shows a clear accident. The question underwent full discussion in *Wells v. Hopwood*, 3 B. & Ad. 20. Lord TENTERDEN there lays down this intelligible rule:—“Several of the cases hitherto decided on this subject are, as to their facts, very near each other, and not easily distinguishable. But it appears to me that a general principle and rule of law may, although not explicitly laid down in any of them, be fairly collected from the greater number. And that rule I conceive to be this:—Where a vessel takes the ground, in the ordinary and usual course of navigation and management, in a tide-river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum. But, where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual and accidental occurrence, such an event shall be considered as a stranding within the meaning of the memorandum.” According to that rule, there clearly was no stranding here, no loss by a peril of the sea.

Tomlinson, in reply, cited *Phillips v. Nairne*, 4 C. B. 348 (E. C. L. R. vol. 56).

*JERVIS, C. J.—I am of opinion that the loss in this case was not a loss by perils of the sea, but a damage falling within the [*881 description of ordinary wear and tear. No doubt the question is one of importance; but I think it has been very unnecessarily brought before the court; for, the matter seems to have been perfectly understood and settled by all the text-writers upon this branch of the law. To make the underwriters liable, the injury must be the result of something fortuitous or accidental occurring in the course of the voyage. Here, the vessel, upon her arrival at Sunderland, goes up the river, and, in consequence of the rising and falling of the tide, rests upon the river's bed, and receives damages. There was nothing unusual, no peril, no accident. To hold that the assured were covered in such a case, would be virtually making the policy a warranty against the wear and tear and ordinary repairs of the vessel. I think the defendant is entitled to judgment.

MAULE, J.—I am of the same opinion; and I concur with the lord chief justice in thinking that this is a very clear case. Stevens and the other text-writers referred to express no sort of doubt, but are evidently well acquainted with the distinction between wear and tear, for which the underwriters are *not* liable and accidents the occurrence of

something out of the ordinary course of the voyage, for which they are liable. This distinction has been well understood for many years. To hold the underwriters liable in such a case as this, would be tantamount to holding that the ordinary repairs of a vessel are to be comprehended within the perils insured against. The case of *Fletcher v. Inglis* was sufficiently distinguished in the course of the argument: the statement of damage there is this,—“Between 9 and 10 at night, the tide having then left the vessel, a cracking noise was heard in the ship, proceeding, *882] as the witness *believed, from something breaking. Some time after this, on the return of the tide, *there was a considerable swell in the harbour, and the ship struck the ground hard several times*: in the morning, eighteen of her knees were found to be broken.” There were in that case some circumstances which also occur here: but there was another circumstance there, which is wanting here, to make the cases parallel. There was *casus fortuitus*,—the swell that set in, *after which* the ship’s knees were found to be broken. That, I apprehend, was the ground of the decision in that case; and that is quite consistent with the argument of Mr. *Scarlett*, who was not likely to lay down a general doctrine which did not meet the assent of the court, so familiar as they were at that time with insurance law. The case evidently proceeded upon the extraordinary and accidental circumstance of the great swell setting in the harbour. Suppose, instead of the swell, the case had stated, or the evidence shown, that a violent storm had arisen, and that the vessel was dashed against a rock, and injured, nobody could have doubted that that was a loss by perils of the sea. That only differs in degree from the actual case of *Fletcher v. Inglis*; but it differs very materially from the present case, which shows a mere subsiding of the ship upon the shore or beach on the receding of the tide, in the usual and expected course. According to sound law and common sense, the assured was entitled to recover in that case: whereas, here, nothing has happened which the assured could have wished or anticipated to happen otherwise than it did happen. They intended the ship to take the ground as she did. There was no accident. We are asked, therefore, to assume a loss by perils of the sea, when the facts disclosed to us, absolutely negative the existence of sea peril. No instance is to be found of underwriters being held liable where the *883] voyage has been conducted to its termination without *anything happening but what was expected and intended, and where the sole cause of the damage was the insufficiency of the ship to bear the ordinary stress of the voyage to which she was exposed. Authority and common sense concur in showing that this is not a liability which ought to be cast upon the underwriters.

CRESSWELL, J.—I am of the same opinion, and should only be repeating what has already been said, if I gave my reasons for concurring with the rest of the court.

WILLIAMS, J.—This clearly is a case of ordinary wear and tear, and not accident. Judgment for the defendant.

When an accident occurs in the ordinary or malposition or overlaying the dock, which course of grounding a vessel in a harbour, and would be a peril of the sea, for which the there is no proof of inherent weakness, the underwriters would be liable: *Potter v. Suffolk Ins. Co.*, 2 Sumner, 197. See *Lake v. Columbian Ins. Co.*, 13 Ohio, 48.

ARDEN v. GOODACRE. Jan. 13.

Testator bequeathed an annuity to his son A., payable quarterly, charging it upon his personal estate only, which, subject to the annuity, he bequeathed to his son B., whom he appointed his executor. The will proceeded,—“And I declare that the receipt of my said son A., signed with his own hand after each of the said quarterly payments shall have become due, shall be the only discharge which my executor shall be bound to accept, for each of such payments, and that it shall be lawful for my executor to require that my said son A. shall attend at the Town-Hall in Nottingham, to receive and give receipts for the said annuity, and to suspend the payment thereof until such requisition shall be complied with, from time to time, as my executor shall think proper:”—

Held, that, assuming the condition to be a valid one, there was nothing to prevent A. from assigning the annuity to a third person.

THIS was an action upon the case for an escape. The declaration stated that the plaintiff had recovered a judgment in the Court of Common Pleas against one William Bingham, for 4000*l.* debt, and 3*l.* 10*s.* costs, and had sued out a *testatum ca. sa.* upon the said judgment, directed to the sheriff of Leicestershire; that, at the time of the issuing of the writ, the sum of 2690*l.* was due and owing from Bingham to the plaintiff; that *the writ was duly endorsed and delivered [*884 to the defendant, then being sheriff of Leicestershire, to be executed; that, by virtue thereof, the defendant took and detained the said William Bingham, until afterwards, the defendant, so being such sheriff, against the will of the plaintiff, suffered and permitted the said William Bingham to escape and go at large; that the sum endorsed to be levied still remained due to the plaintiff; and that, by means of the premises, the plaintiff had lost the said debt, and the benefit of the said judgment, &c.

The defendant pleaded not guilty.

The circumstances out of which the action arose will be found detailed in *The Queen v. The Sheriff of Leicestershire*, antè, p. 367, and in the report of a former trial, *Arden v. Goodacre*, antè, p. 371.

The cause came on for trial a second time before JERVIS, C. J., at the sittings in Middlesex after the last term. William Bingham, the judgment debtor, at the time of the escape, was in insolvent circumstances, except for the interest he took under the will of his father, who had then recently died. The will, which was read in evidence, contained the following clauses:—

"I give to my son William Bingham an annuity of 300*l.* per annum, to be paid quarterly, on the 24th of June, the 29th of September, the 24th of December, and the 25th of March; the first payment to be made on such of those quarterly days as shall first happen after my decease: and I charge the said annuity upon my personal estate only, and declare that the receipt of my said son William Bingham, signed with his own hand after each of the said quarterly payments shall have become due, shall be the only discharge which my executor shall be *885] bound to accept, for each of such payments, and *that it shall be lawful for my executor to require that my said son William Bingham shall attend at the Town Hall in Nottingham, to receive and give receipts for the said annuity, and to suspend the payment thereof until such requisition shall be complied with, from time to time, as my executor shall think proper: And, subject to the payment of my debts, funeral and testamentary expenses, and the said annuity, I give all my real and personal estate whatsoever and wheresoever unto my son Henry Corles Bingham, his executors, administrators, and assigns, and appoint him executor of this my will."

It appeared, that, shortly after his escape, William Bingham, having been arrested at the suit of another creditor, named Thompson, assigned to him his interest under the above will. And Henry Corles Bingham, the brother, and executor under the father's will, who was called as a witness, stated that he had not assented, and would not assent, to the assignment. It was thereupon contended on the part of the defendant, that the assignment to Thompson was therefore void, and consequently the plaintiff had lost nothing substantial by the escape.

On the part of the plaintiff, it was insisted that this was an absolute gift of the annuity to William Bingham, and that the condition annexed to it was repugnant and void, inasmuch as there was no gift over in the event of anticipation.

His lordship, ruling in conformity with the decision of the court upon the former occasion, desired the jury to assess the damages upon the assumption that the annuity was assignable without the consent of the executor, and also upon the assumption that it was not so assignable.

The jury found, that upon the former supposition, the damages sustained by the plaintiff would be 1787*l.* 5*s.* 6*d.*; and, upon the latter, 250*l.*

*886] The lord chief justice thereupon directed a verdict to *be entered for the plaintiff, damages 1787*l.* 5*s.* 6*d.*; (a) giving the defendant leave to move to reduce it to 250*l.*, if the court should be of opinion that the annuity was not assignable.

Channell, Serjt., now moved accordingly.—There can be no doubt that the testator's intention was, to provide a fund for the personal support of

(a) It is difficult to see upon what principle this assessment proceeded: it was stated that the value of the annuity at the time of the escape, apart from the contingency, was 3402*l.*

- his son, and that the money should in no event go to his creditors: and the court will give effect to that intention, unless it is repugnant to some known rule of law. The rule upon the subject is thus laid down in 1 Jarman on Wills, 815:—"The principle which precludes the imposition of restrictions on the aliening power of persons entitled to the inheritance of lands, applies to the entire or absolute interest in personalty.' It is clear, therefore, that, if a legacy were given to a person, his executors, administrators, or assigns, with an injunction not to dispose of it, the restriction would be void, and a gift over in case of the legatee dying without making any disposition, would be also rejected, as a qualification repugnant to the preceding absolute gift.(a) Upon the principle which forbids the disposition of property divested of its legal incidents, it is clear that no exemption can be created by the author of the gift, from its liability to the debts of the donee; and property cannot be so settled as to be unaffected by bankruptcy or insolvency, which is a transfer, by operation of law, of the whole estate: and it is immaterial, for this purpose, what is the extent of interest conferred by the gift, the principle being no less applicable to a life interest, than to an absolute or transmissible property. Whatever remains in the *bankrupt or insolvent debtor at the time of his bankruptcy or insolvency, becomes vested in the person or persons [*887 on whom the law, in such an event, has cast the property." The distinction is taken by Lord ELDON, in *Brandon v. Robinson*, 18 Ves. 429, 433, 1 Rose, B. C. 197: "There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear, generally speaking, that, if property is given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and, after his bankruptcy, over, is quite different from an attempt to give him for his life, with a proviso that he shall not sell or alien it." The effect of the gift over, is, to limit the interest which the donee otherwise would take. Here, it is submitted, there is that which is tantamount to a gift over: the annuity is charged upon the testator's personal estate; and the personal estate is given to the executor, subject to the payment of the annuity, which, in the event of the annuity being suspended, is discharged from the payment. [MAULE, J.—Suppose William Bingham assigned the annuity, and covenanted with the assignee that he would attend at the Town Hall at Nottingham on the proper days to receive the annuity, and would give receipts and do all that was needful to give effect to the assignment,—do you contend that the gift over would in that case operate, from the time of the assignment?] The court can see very clearly that the testator intended that the annuity should cease in a given event; and, if so, it was not assignable.

MAULE, J.—It appears to me, and to the rest of the court, I believe,

(a) Citing *Bradley v. Polxoto*, 3 Ves. 324, *Ross v. Ross*, 3 Jac. & W. 154.

that this was an annuity which William Bingham might legally dispose of, if so minded. Assuming that he could not get rid of the condition imposed by the will, it would be perfectly competent to him to *888] *covenant with the assignee that he would attend at the proper time and place to receive the annuity, and do all that might be necessary to discharge the executor. And this he clearly might do without the assent of the executor. That seems to me to dispose of the whole case. It is upon that principle, I apprehend, that the jury have assessed the higher sum. I therefore think there is no ground for a rule. It is unnecessary for us to determine that the condition that William Bingham shall personally attend at the Town Hall at Nottingham to receive the annuity and give receipts, is a void condition. Assuming it to be operative, it cannot be denied that he might effectually bind himself, by such a covenant as I have suggested, to do what might be necessary to enable the assignee to enjoy the annuity, without the assent of the executor.

CRESSWELL, J.—I am of the same opinion. Assuming, which is taking the view which is most favourable to my Brother *Channell*,—that the condition annexed to this grant is not repugnant and void, I agree with my Brother MAULE in thinking that William Bingham might lawfully assign this annuity without his brother's assent, if he could satisfy the purchaser that he would do all that might be required to give effect to such assignment.

WILLIAMS, J.—I am of the same opinion. For the reasons given by my Brother MAULE, I think that William Bingham could legally assign this annuity without the assent of the executor. Assuming the condition to be good, its only practical effect would be to diminish the market value of the annuity.

JERVIS, C. J., concurring,

Rule refused.

*889]

*ABLEY v. DALE. Jan. 31.

Where, in tort, there was an issue of law and an issue of fact, and both were determined in favour of the plaintiff, but the damages recovered were less than 5*l.*, and there was a suggestion to deprive the plaintiff of costs under the 9 & 10 Vict. c. 95, s. 129,—Held, that the plaintiff was not entitled to *any costs*.

THIS was an action of trespass for an alleged false imprisonment of the plaintiff under a warrant issued out of the Whitechapel County Court of Middlesex. The defendant pleaded two pleas,—not guilty,—and a justification. The plaintiff joined issue on the first plea, and demurred to the second. Upon the argument of the demurrer, in Michaelmas Term, 1850, there was judgment for the plaintiff.(a) The

(a) See *Abley v. Dale*, 10 C. B. 62 (E. C. L. R. vol. 70).

issue of fact was tried at the sittings after Hilary Term, 1851, when a verdict was found for the plaintiff, damages 40s.; there was no certificate that the cause was a fit one to be tried in the superior court; and there was afterwards an unsuccessful motion for a nonsuit.(a)

The plaintiff,—after a suggestion to deprive him of costs under the 9 & 10 Vict. c. 95, s. 129,—called upon the master to tax his costs of the demurrer. The master having declined to do so.

Quain, on a former day in this term, applied for the direction of the court. He founded his claim to these costs, upon the 3 & 4 W. 4, c. 42, s. 34; and he referred to Gregory v. The Duke of Brunswick, 3 C. B. 481 (E. C. L. R. vol. 54), Reed v. Shrubsole, 7 C. B. 630 (E. C. L. R. vol. 62), 6 D. & L. 707, and Poole v. Grantham, 7 M. & G. 1030, (E. C. L. R. vol. 49), 8 Scott, N. R. 722, and to Lord Denman's act, 3 & 4 Vict. c. 24, s. 2.

Manisty now showed cause.—The 34th section of the *3 & 4 W. 4, c. 42, enacts, that, “where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given, shall have judgment to recover his costs in that behalf.” The judgment on a demurrer is interlocutory only; no costs are awarded till the final judgment is pronounced. The plaintiff, having obtained a verdict upon the trial of the issue in fact which does not entitle him to costs, cannot have a final judgment for any costs. Poole v. Grantham does not touch this point. [JERVIS, C. J.—Lord Denman's act, 3 & 4 Vict. c. 24, s. 2, where there is a verdict for less than 40s., and no certificate, merely negatives the plaintiff's right to costs “in respect of such verdict.”] Here, it is only in respect of the verdict that the plaintiff claims these costs. It is difficult to see how a plaintiff who has a final judgment on a verdict which does not entitle him to costs, can be entitled to costs on a demurrer. [JERVIS, C. J.—This case must turn upon the 9 & 10 Vict. c. 95, s. 129, which enacts that, “if any action shall be commenced in a superior court, for any cause, other than those specified in s. 128, for which a plaint might have been entered in any court holden under that act, and a verdict shall be found for the plaintiff for a sum less than 20l., if the said action is founded on contract, or less than 5l., if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs.”] That clearly disentitles the plaintiff to any costs. [MAULE, J.—Do you contend, that, if there be an issue in law and an issue of fact, and the plaintiff has judgment on the issue in law, and the issue of fact is found for the defendant, the plaintiff is entitled to no costs under the 3 & 4 W. 4, c. 42, s. 34?”] That presents a totally different case from this. But, as this record stands, a judgment for costs for the

(a) See Abley v. Dale, ante, p. 878.

*891] plaintiff, inasmuch as the judgment *would be entire, and it would not therefore appear that they were costs of the demurrer, would be erroneous.

Quain, in support of his rule.—The 34th section of the 3 & 4 W. 4, c. 42, clearly gives the plaintiff the costs of the demurrer. PARKE, B., in delivering the judgment of the Exchequer Chamber, in *Gregory v. The Duke of Brunswick*, says: (a) “Though the object of the statute was, to provide for cases not included in the 8 & 9 W. 3, c. 11, s. 2, which had been construed not to extend to any cases except where the plaintiff would have recovered his costs if he had recovered, *its terms are so general that there seems to be no question but that it gives a right to a judgment and costs in all cases of demurrer.*” [MAULE, J.—The pervading principle of the county court act, is, that actions which are fit to be brought in the county court,—and the test of fitness, in actions of tort, is, the recovery of 5*l.*,—shall not be brought in the superior courts, but at the peril of the loss of costs.] Costs of a demurrer are wholly independent of the costs of the trial; and it is these latter only that the 129th section is dealing with. [JERVIS, C. J.—The county court act does not apply unless there is a suggestion.] It was intended that the real point should be raised here, and therefore it may be assumed that a suggestion has been duly entered. In *The Mayor, &c., of Macclesfield v. Gee*, 13 M. & W. 470,† 2 D. & L. 418, there were issues of fact and an issue in law: the plaintiffs obtained judgment on the issue in law, and afterwards (the right they were seeking by the action to enforce having been negatived in another action) took out a rule to discontinue on payment of costs; and it was held that the plaintiffs were, notwithstanding, entitled to the costs of the demurrer, under the 3 & 4 W. 4, c. 42, s. 34. PARKE, B., there says, “With respect to the last argument urged by *892] Mr. *Henderson*, that *the terms of the rule to discontinue oblige the plaintiff to pay the costs generally, I think the answer is, that all which the plaintiff is bound to do, is, to pay such costs of discontinuance as the master shall tax, not the costs of the demurrer; and that the plaintiff is not precluded from obtaining those costs. Since the statute 3 & 4 W. 4, c. 42, s. 34, by which it became the duty of the court to give judgment for the costs on a demurrer in favour of the party succeeding on the demurrer, I have no difficulty in saying that a writ of error may be brought on such judgment.” In *Reed v. Shrubsole*, 7 C. B. 631 (E. C. L. R. vol. 62), 6 D. & L. 707, a plaintiff who recovered less than 5*l.* on a writ of inquiry, in an action of tort, was held to be entitled to costs. [MAULE, J.—I do not see how you are to get over the very plain words of the act,—“the plaintiff shall have judgment to recover such sum only, and *no costs.*” The more the expense has been enhanced by reason of the demurrer, the more improper has been the plaintiff’s conduct in bringing an action which he ought not

(a) 3 C. B. 493 (E. C. L. R. vol. 54).

to have brought in the superior court.] If the defendant has a verdict, he is to have costs as between attorney and client. Suppose the defendant succeeds on both the issue in law and the issue of fact, is he to have the costs of the demurrer also as between attorney and client? [JERVIS, C. J.—Why not?] The costs of the demurrer are quite distinct from all other costs. The plaintiff is entitled to a final judgment for those costs. The *unica taxatio* is merely for the convenience of the court.

JERVIS, C. J.—I think this rule ought to be discharged. This was an action for a tort, commenced before the passing of the 13 & 14 Vict. c. 61, and the plaintiff at the trial has recovered a verdict for less than 5*l.*, but obtained no certificate under the 129th section of the 9 & 10 Vict. c. 95, that the action was fit to be *brought in the superior court; [*893 the plaintiff had judgment upon a demurrer to one of the pleas; and a suggestion has been entered on the roll, under s. 129, to deprive the plaintiff of costs. Under these circumstances, the question is, whether the plaintiff is entitled to the costs of the demurrer. It is unnecessary for us to consider the effect of either the 3 & 4 W. 4, c. 42, s. 34, or Lord Denman's act, 3 & 4 Vict. c. 24, s. 2, because this turns upon a later act,—9 & 10 Vict. c. 95,—in which the legislature has in substance said, that, where the plaintiff has brought a frivolous action in the superior court, he shall have judgment to recover the amount of the verdict only, and *no costs*. I think we cannot give the plaintiff costs in any shape, without violating the act of parliament.

MAULE, J.—I am of the same opinion. This is an action which might have been brought in the county court, and the plaintiff has obtained a verdict for less than 5*l.* In considering what is the proper effect and operation of the 129th section of the 9 & 10 Vict. c. 95, it is material to consider what are the words used, and what was the intention of the legislature. In this case there was an issue in law, and an issue of fact, and both have been determined in favour of the plaintiff, but the jury have found that the plaintiff was entitled to less than 5*l.* damages. Now, the provision in the act is, that, if any action founded on tort, which is not within any of the exceptions, and for which a plaint might have been entered in the county court, shall be brought in a superior court, and a verdict shall be found for the plaintiff for a sum less than 5*l.*, the plaintiff shall have judgment to recover such sum only, and *no costs*. Construing these words according to their full literal and ordinary meaning,—which is the proper mode of construing acts of parliament, as well as other documents, unless there is some special reason for construing *them otherwise,—these words do deprive this [*894 plaintiff of costs: the act in terms says that under the circumstances he shall have no costs at all. It has been insisted, on the part of the plaintiff, that, regard being had to the subject-matter, and to the plaintiff's rights under prior statutes, these words require a more narrow construction, and must be taken to mean, no costs “in respect

of the trial or of the verdict." That would, I think, be a very considerable stretch of interpretation. And, when we consider what was the general scope and intention of this act,—to discourage frivolous litigation in the superior courts,—I think it is impossible not to see that it was intended to apply to costs on demurrer as well as to other costs. The term "no costs" is a distinct negation of every description of costs. The words are clearly comprehensive enough to embrace these costs. What, then, was the intention of the legislature? The general spirit of the act was, to provide competent tribunals for the trial of causes of small value, with greater speed and economy than was consistent with the constitution of the superior courts, and to impose a sort of penalty upon plaintiffs who unnecessarily resort to the more expensive tribunal. With certain exceptions, therefore, where the jury, in a case of this sort, find that the cause of action is of less value than 5*l.*, they find conclusively (and the legislature, I apprehend, so intended) that the cause is not a proper one to be brought in the superior court; and that quite independently of the nature of the question to be tried. If the amount in dispute is so small that it is not fit that it should be made the subject of proceedings in the superior court, the plaintiff is treated as a person who has done wrong in bringing his action there. The plaintiff here says he is entitled to costs because he has by his demurrer raised a question of law upon which he has succeeded. But *895] the answer to that, is, that the question of law might have *been disposed of in the county court; it is perfectly competent to a defendant or a plaintiff in the county court to say, that the plaint is insufficient, or the plea no answer to the demand. I therefore think that the words as well as the intention of the legislature manifestly take away *all costs* under the circumstances which have happened here: and I think this decision is in perfect consonance with all the cases which have been cited. Mr. *Quain* having properly conceded, in order to raise the point, that the suggestion should be taken to have been entered before judgment, has, I think, entitled the plaintiff to have this rule discharged without costs.

CRESSWELL, J.—If it had been necessary to decide this case with reference to the 3 & 4 W. 4, c. 42, s. 34, and the 3 & 4 Vict. c. 24, s. 2, a question of some nicety might have arisen. But I think the county court act, 9 & 10 Vict. c. 95, s. 129, relieves the case from all difficulty. Where the plaintiff in an action of tort recovers less than 5*l.*, the judgment is to be for the amount of the verdict only, and *no costs*. Reading the words, as we are bound to do, in their common and ordinary acceptance, I think it is impossible to come to any other conclusion. For the reasons given by my Brother MAULE, I concur in the propriety of discharging this rule without costs.

WILLIAMS, J., concurred.

Rule discharged, without costs.

***DOE d. SAXTON and Others v. TURNER.** Jan. 29. [*896

The court will only under special circumstances grant an order for particulars of the premises sought to be recovered in an action of ejectment.

BOVILL moved for a rule to show cause why the lessors of the plaintiff should not deliver to the defendant an account in writing of the particulars of the premises for which the action is brought. The application was founded upon an affidavit which stated, that, save and except as appeared by a notice which had been served upon him,—which described the premises as “the plot or piece of ground in your occupation, situate at, &c., abutting on the west and north to other lands belonging to us, some, or one of us, and on the north and east to land of and belonging to the Earl of Dartmouth, now or late in your occupation, and to the occupation-road there, together with the buildings and erections thereon, and appurtenances thereto,”—no particulars of the premises sought to be recovered had been given to the defendant, nor was he otherwise acquainted with such particulars, nor did he know what land or premises were sought to be recovered by this ejectment. The affidavit then went on to state that the whole of the premises held by the defendant consisted of 2 roods and 18 perches, with buildings and outhouses thereon, occupied altogether, without any division or separation; and that the whole had been in the occupation of the deponent and his father for upwards of thirty years, without any claim. It was submitted that the defendant was entitled to be informed of the quantity or the exact boundaries.

Per curiam.—The defendant has the means of knowing what the lessors of the plaintiff are going for; and he may defend specially for his own. Rule refused.

***SMITH and Others v. The HULL GLASS COMPANY.** Jan. 22. [*897

A company established for the manufacture of glass, completely registered under the 7 & 8 Vict. c. 110, had power under a clause in their deed of settlement to appoint a *manager* of their works and factories, to “superintend and transact, under the control of the board of directors, the manufacturing business of the company,” and to whom the board of directors were by another clause authorized to delegate “such and so many of the powers thereby given to them, as would enable him to carry on the said works and manufacturing business in an efficient manner:”—Held, that the company were liable for goods supplied to them for the purposes of their manufactures, upon orders given by such manager, although there was no express delegation of authority.

Held also, that the company were liable for goods supplied upon the orders of unauthorized persons,—such as, the chairman, deputy chairman, and secretary,—where the goods were with their knowledge received upon their premises, and used by them for the purposes of their trade.

THIS was an action of debt for goods sold and delivered by the plaintiffs to the defendants, a registered joint-stock company.

The cause was tried before CRESSWELL, J., at the sittings in London in Michaelmas Term, 1851,^(a) when the jury found a special verdict, which was afterwards, by consent, turned into a special case, upon the argument of which the court were to draw such inferences of fact as the jury might have drawn. The facts so found were as follows:—

The plaintiffs during all the time after mentioned were, and are, persons carrying on business in the city of London, as merchants and co-partners; and one William Farthing the elder, and one William Farthing the younger, during all the time after mentioned, carried on partnership together, under the firm of William Farthing, Son, & Co., at the town of Kingston-upon-Hull, as general agents, and, during all the time aforesaid, were employed as such general agents by the plaintiffs as such merchants as aforesaid.

The defendants, before and during all the time after mentioned, were, and are a joint-stock company within the true intent and meaning of the 7 & 8 Vict. c. 110, for the registration, incorporation, and regulation of *joint-stock companies, and long before and during all the *898] time after mentioned carried on the business or trade of manufacturing and selling glass, as such joint-stock company, at Kingston-upon Hull; and, before any of the times after mentioned, the defendants had been completely registered under and in pursuance of the provisions of the said statute; and such complete registration had, before any of the said times after mentioned, been duly certified by the registrar of joint-stock companies, and his certificate thereof duly obtained by the said company, under the provisions of the said act.

Previously to the said complete registration being certified as aforesaid, the deed of settlement of the said company were in due manner registered, according to the statute in that behalf. [The deed,—which bore date the 27th of March, 1846, and professed to be made “between the several persons whose names and seals were thereunto subscribed and affixed (except Thomas Holmes and George Buckton) of the one part, and the said Thomas Holmes and George Buckton of the other part,—was set out: the material parts of it were the following:—]

“That, for the purpose of establishing the said company in conformity with and by virtue of the provisions of the said statute for the registration, incorporation, and regulation of joint-stock companies, each and every of the said several persons parties hereto of the one part (so far as relates to the acts and deeds of himself and herself respectively, and his and their respective heirs, executors, and administrators only, and not further or otherwise), doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, covenant, promise, and agree to and with the others,

(a) For the argument on a former trial between the parties, vide 8 C. B. 668 (E. C. L. R. vol. 65).

and every other of them, and their and his executors and administrators, that they, the said several persons parties hereto of the one part shall and will, immediately from and after the execution of these presents, *become and be a company, by the name, style, and firm of The Hull Glass Company, for the purposes, and upon and under the terms, agreements, rules, and regulations hereinafter expressed and set forth; and that they the said several persons, or such of them as shall be necessary in that behalf, shall and will forthwith do all such acts, and sign and deliver all such statements, certificates, and other documents, as shall be necessary, in order that the said company may be completely registered in the office for the registration of joint-stock companies, under and pursuant to the provisions of the said statute hereinbefore mentioned, and shall and will apply for and endeavour to obtain a certificate of such complete registration, in due form of law: And that, for the same purpose, each and every of them the said several persons parties hereto of the one part (so far as relates to the acts and deeds of himself and herself, and his and her respective heirs, executors, and administrators only, and not further or otherwise), doth hereby for himself and herself severally and respectively, and his and her several and respective heirs, executors, and administrators, covenant, promise, and agree with and to the said Thomas Holmes and George Buckton (as trustees on the part of the said company), and their executors and administrators, in manner following, that is to say, that they the said several persons parties hereto of the one part, shall and will immediately from and after the execution of these presents become and be a company or copartnership, by the name and style aforesaid, and shall and will, from time to time after the complete registration of the said company under the provisions of the said statute, well and truly pay or cause to be paid to the said company or copartnership, or some officer thereof lawfully authorized in that behalf, all calls or further instalments which shall, under or by virtue of or in accordance with the provisions of these presents, be made or become due and payable *upon or in respect of the said several shares the numbers whereof are set opposite to the names of the said several covenanting parties respectively in the said schedule hereto, and so taken by them respectively as hereinbefore recited, and every of them, without any deduction or abatement whatsoever, and shall and will pay the same calls or further instalments at the several times when according to the said provisions the same shall respectively from time to time become due and payable; and also shall and wi' well and truly observe, perform, stand to, abide by, and keep all and singular the rules, regulations, engagements, agreements, clauses, matters, and things hereinafter set forth and contained for or in relation to the managing and conducting the affairs and concerns of the said company, or for or in relation to the regulation of the transfer of shares in the capital of the said company, or otherwise; and also all such rules,

regulations, by-laws, agreements, clauses, matters, and things as under or by virtue of, or in accordance with, the provisions of these presents and the said statute hereinbefore mentioned, or under or by virtue of these presents only, but in accordance with the provisions of the said statute, shall be made, instituted, or entered into for the purposes aforesaid, or either of them, or otherwise in relation to the business or capital of the said company: And, further, for fully carrying the purposes aforesaid into effect, and complying with the provisions of the said statute,—

“1. That the said company shall be called or styled The Hull Glass Company:

“2. That the business or purpose of the said company shall be, the manufacturing and vending of glass and glassware of every description, and, among others, plate-glass, crown-glass, &c.:

“4. That there be five directors of the said company, and that George Buckton, William Farthing, Thomas *Wilson, Thomas Ward *901] Gleadow, and Robert Wake (who are respectively parties to these presents of the one part), be the first directors of the said company, who at their first meeting after such election shall from their own body select a chairman and a deputy-chairman:

“6. That there be a secretary of the said company, and that the directors shall have power to appoint the secretary of the said company:

“7. That there be a manager of the works, factories, and business of the said company, if the board of directors shall from time to time think fit, who shall be resident upon or in the neighbourhood of the said works:

“11. That, upon the commencement of the business of the said company, after complete registration as aforesaid, the affairs and concerns of the said company shall be managed under and subject to the regulations and agreements hereinafter contained:

“12. That the shareholders of the said company shall assemble at the house or office of the said company, or at some other convenient place to be named by the directors, twice in every year; and every such assembly of shareholders shall be styled an ordinary general meeting, and shall have full power to superintend, regulate, and control, and generally to discuss and manage all the affairs of the said company, save when special powers are hereinafter reserved to the extraordinary general meetings:

“47. That, previous to the meeting in March, 1847, and, after that time, previous to the half-yearly meetings in September and March in that and every subsequent year during the continuance of this company. *the directors* shall fix and determine upon such dividends out of the clear profits of the company, after deducting therefrom the sum, if any, set apart by *the board of directors* for the purposes of the reserved or

guarantee fund hereinafter provided for, as in their judgment shall seem fit, *which shall be divided amongst the shareholders in proportion to their respective shares: and at each such meeting *the* [*902 *directors* shall declare to the proprietors the dividend which they shall have so fixed and determined upon, and the time for the payment thereof:

“48. That such proportion of the net profits which shall appear to have been made by the company during any year, as *the board of directors* may think desirable, but not exceeding in any one year 25 per cent. upon the amount of such net profits, shall be retained by *the board of directors*, in order to form a fund called the reserved or guarantee fund, which fund shall accumulate at compound interest, and be applicable and be applied by *the board of directors* for the sole purpose of meeting any extraordinary demands to which the company may become liable, or to meet any losses to which the company may unexpectedly be subject, or in the erection of further buildings, or otherwise to extend the works of the company, &c.:

“53. That the directors shall meet together at the office of the company at Stoneferry, or such other place as they shall from time to time fix upon, once in every week at the least, and at such other time or times as they shall be duly convened in manner hereinafter mentioned, and every such meeting shall be styled a *board of directors*:

“55. That no business shall be transacted at any *board of directors*, unless three directors be present at the commencement of the business, and whose decision shall take place upon the whole or any part thereof:

“57. That the meeting of the *board of directors* shall adjourn, if three of the directors shall not assemble and proceed to business within half an hour from the time fixed for the meeting, or if that number shall not be present when the whole or any part of the business of the *meeting is to be decided; and of which adjournment notice shall [*903 be given as hereinbefore set forth:

“62. That the minute of the proceedings at every *board of directors* shall be entered in a book, and signed by the chairman and any other two directors who shall be present at such meeting, unless the same shall be sealed with the seal of the company, in which case such minutes shall be signed by the chairman only:

“63. That, in all other respects, the board of directors shall be regulated, and the business thereof be conducted and decided upon, as the directors present shall from time to time think proper, or according to the rules and orders of any preceding board of directors:

“69. That the board of directors shall (if they see fit) appoint one or more manager or managers of the works and factories of the company, to be resident in the neighbourhood thereof, *who shall superintend and transact, under the control of the board of directors, the manufacturing business of the said company*; and shall enter into or confirm

any agreement for engaging the services of such manager or managers, either for a term of years or otherwise, and at such salary, bonus, and other terms of remuneration as they may think fit and reasonable :

“70. That the board of directors shall also from time to time in like manner appoint a solicitor and secretary of the said company, when such offices shall respectively from time to time become vacant ; and shall also appoint and keep in employ as many clerks, artisans, officers, workmen, agents, and servants as the business of the company shall require, and remove them at their pleasure ; and may authorize the manager or managers or secretary to employ or remove any artisans, workmen, agents, or servants under them :

“74. That the board of directors may, if they think proper, delegate to the manager such and so many of the powers hereby given to them, as will enable him to carry *on the said works and manufactur-
*904] ing business in an efficient manner :

“78. That the board of directors shall have full power to do all other acts that they may consider necessary and proper for the purpose of carrying into effect the objects of the company, as hereinbefore particularly stated and set forth, excepting such of the same objects in relation to which they are required to obtain the sanction and consent of an extraordinary general meeting, to be specially called for that purpose, previously to the same being carried into effect :

“79. That all purchases to be made by or on behalf of the company shall be paid for when due, either in cash or in bills drawn by or in possession of the company ; but no promissory note or acceptance shall be given for such purchases, so as to bind the company, on any pretence whatever :

“81. That, in order, as far as may be, to limit the liability of individual shareholders, in respect of transactions between the company and the public, to the amount of the share or shares of each shareholder, the board of directors shall, as far as practicable, cause all contracts and engagements on behalf of the company to be made and entered into with an express stipulation that each shareholder shall be liable in respect of such contract or engagements to the extent only of his share or shares in the capital of the company :

“84. That all the various payments to which the funds or property of the company shall from time to time be subject or liable, shall be made by order or under the direction of the board of directors ; and no payment shall be valid without such order or direction.

“116. That, subject and without prejudice to the powers hereinbefore given to the general meetings, the board of directors shall have the entire management and superintendence over the affairs and concerns
*905] of the *company, but nevertheless, in strict conformity to the laws and regulations hereby established, or hereafter to be established by the general meetings, and in accordance with the provisions

of the said statute hereinbefore mentioned ; and, in cases for the time being unprovided for by these presents, or by the general meetings, it shall be lawful for the board of directors to act in such manner as shall appear to them best calculated to promote the interests of the company : and, for the guidance of the board of directors, it shall be lawful for an extraordinary meeting of the board of directors, specially called for that purpose, to make, in such manner as by law required, whatever by-laws, rules, or regulations they shall think proper for the government of their own board, provided the same be not inconsistent with the fundamental principles or constitution of the company, as established and settled by these presents under the provisions of the statute hereinbefore mentioned, or as altered or changed by virtue of the power hereinbefore given to the general meetings for that purpose ; and at any time to alter or repeal all or any such by-laws, rules, and regulations :

“ 117. That the managers and secretary for the time being shall attend the board of directors and the general meetings whenever they shall be required, and give a true account of all transactions relating to the business of the company, and of all papers and things relating thereto, which may come to their or his hands or knowledge ; and such managers and secretary shall respectively keep such books and accounts as the directors shall from time to time order or require, which said books and accounts shall be kept at the offices of the company, and be at the entire disposal of the directors for the time being ; and that the managers and secretary shall obey all the orders and directions which shall from time to time be given by the board of directors, so far as the same shall not be repugnant to the powers and authorities hereby vested in them respectively :

*“ 120. That it shall also be lawful for the said directors, when and as they shall see fit, to delegate all or any of the powers hereby conferred upon them, to any one or more of their body who may be employed as a committee or deputation on any matter of business for or on behalf of the said company : [*906

“ 141. That all the directors, managers, officers, and servants for the time being of the company, and all shareholders against whom any execution shall be issued, and on whose effects any levy shall be made, for any debt or demand of the company, or in respect of any covenant or agreement to be entered into on behalf of the company and for the benefit thereof, shall from time to time and at all times be saved harmless and kept indemnified by the company from and against all costs, charges, &c. ; and that none of the said directors, managers, officers, and servants shall be answerable or accountable for the others or either of them, nor for the receipts, acts, deeds, or defaults of the others or other of them, but each of them with and for his own receipts, acts, deeds, and defaults respectively, notwithstanding their joining in any receipt, act, or deed, for conformity, &c. :

“ 142. That none of the shareholders shall buy, order, or contract for, or sell, any article or thing whatsoever for or on account of the company, or interfere with any part of the business of the company, without the order or authority of the board of directors.”

The defendants carried on their said business under the said deed; and there was no other deed of settlement, or other deed or instrument regulating the business of the company, or in pursuance of which the same was carried on.

In carrying on the said business, orders for the goods and merchandises from time to time supplied, used, and required in and for the purposes of the said trade or business by the defendants, were in fact always *907] given, as *on behalf and on account of the defendants, by the chairman or deputy-chairman for the time being of the said directors, or by the manager of the works and factories of the company, or the secretary for the time being of the said company; and all goods and merchandises so ordered as aforesaid, whether by the said chairman or deputy-chairman, working manager, or secretary, up to and until the time of the ordering and purchasing of the goods and merchandises hereinafter mentioned, had been and were, from time to time during all the time aforesaid, delivered on the premises of the said company, for the said company, and used in their business, and paid for by the directors of the said company, as on behalf of the said company, after the same were respectively delivered on the said premises of the said company in pursuance of such orders.

The goods and merchandises hereinafter mentioned (the same being goods and merchandises used in and required for the purposes of the said trade or business so carried on by the defendants as aforesaid) were, at the respective times of the ordering, purchasing, and delivery thereof, as hereinafter mentioned, in the possession of the said William Farthing the elder and William Farthing the younger as such general agents as aforesaid, to be sold and disposed of by them as such agents, for and on behalf of the plaintiffs, to whom the said goods and merchandises, at the respective times aforesaid, lawfully belonged.

Whilst the said company so carried on their said trade or business as aforesaid, to wit, on the 1st of February, 1847, and on divers other days and times between that day and the commencement of this suit, the said William Farthing the elder, at those times being the chairman of the directors of the said company duly appointed by the directors thereof, did, as such chairman, order and purchase, in the name and on *908] behalf of the said defendants, *of and from the said William Farthing, Son, & Co., certain quantities of the said goods and merchandises of the plaintiffs, so being in the possession of the said William Farthing, Son, & Co. as such agents as aforesaid; and the said William Farthing, Son, & Co. thereupon, to wit, on the days and times last aforesaid, in pursuance of the said orders, delivered to and for the

defendants, at Kingston-upon-Hull, at the said premises of the defendants where they so carried on their said trade or business, the said goods and merchandises so purchased and ordered as aforesaid, the same goods and merchandises then and there being of the price and value of 46*l.* 8*s.* 6*d.*, and no more: and the said William Farthing, Son, & Co. then, at the respective times of such deliveries, sent and delivered to the defendants invoices or bills of parcels, stating therein that the said goods and merchandises were sold by the said William Farthing, Son, & Co. in their own names, and without disclosing the names of the plaintiffs to the said defendants, at prices therein mentioned, amounting together to the price or sum of 46*l.* 8*s.* 6*d.*, and no more.

Whilst the defendants so carried on their said trade or business as aforesaid, to wit, on the 1st of March, 1847, and on divers other days and times between that day and the commencement of this suit, one T. W. Gleadow, at those times respectively being the deputy-chairman of the said directors by them duly appointed in that behalf, did, as such deputy-chairman, order and purchase, in the name and on behalf of the defendants, of and from the said William Farthing, Son, & Co., certain other quantities of the said goods and merchandises of the plaintiffs, so being in the possession of the said William Farthing, Son, & Co. as such agents as aforesaid; and the said William Farthing, Son, & Co. thereupon, to wit, on the days and times last aforesaid, in pursuance of the said last-mentioned orders, delivered to and for the *said defend- [*909
ants, at Kingston-upon-Hull, at the said premises of the defend-
ants where they so carried on their said trade or business, the said goods and merchandises so ordered and purchased as last aforesaid (the same last-mentioned goods and merchandises then and there being in the whole of the price or value of 87*l.* 6*s.*): and the said William Farthing, Son, & Co., in their own names, and without disclosing the names of the plaintiffs, then, at the respective times of such last-mentioned deliveries, sent and delivered to the defendants invoices or bills of parcels, stating therein that the said goods and merchandises last mentioned were sold by the said William Farthing, Son, & Co. to the defendants at prices therein mentioned, amounting together to the price or sum of 87*l.* 6*s.*

Whilst the defendants so carried on their said trade or business, to wit, on the 1st of April, 1847, and on divers other days and times between that day and the commencement of this suit, one Stanger, then being the manager of the works and factories of the said company duly appointed by the directors, did, as such manager, order and purchase, in the name and on behalf of the defendants, of and from the said William Farthing, Son, & Co., certain other of the said goods and merchandises of the plaintiffs, so being in the possession of the said William Farthing, Son, & Co., as such agents as aforesaid; and the said William Farthing, Son, & Co., thereupon, to wit, on the several

days and times last aforesaid, in pursuance of the said last-mentioned orders, delivered to and for the said defendants, at Kingston-upon-Hull aforesaid, at the said premises of the defendants where they so carried on their said trade or business, the said goods and merchandises so ordered and purchased as last aforesaid (the same then and there being in the whole of the price or value of 29*l.* 3*s.*): and the said William *910] Farthing, Son, & Co., then also, at the *respective times of such last-mentioned deliveries, sent and delivered to the defendants invoices or bills of parcels, stating therein that the said goods and merchandises last mentioned were sold by the said William Farthing, Son, & Co., in their own names, and without disclosing the names of the plaintiffs to the defendants, at the prices therein mentioned, amounting together to the price or sum of 29*l.* 3*s.*

Whilst the defendants so carried on their said trade or business, to wit, on the 1st of August, 1847, one Watson Carlill, then being the secretary duly appointed of the said company, did, as such secretary, order and purchase, in the name and on behalf of the defendants, of and from the said William Farthing, Son, & Co., certain other goods and merchandises (other parcel of the said goods and merchandises of the plaintiffs so in the possession of the said William Farthing, Son, & Co., as such agents as aforesaid); and the said William Farthing, Son, & Co., thereupon, to wit, on the day and year last aforesaid, in pursuance of the said last-mentioned order, delivered the last-mentioned goods and merchandises to and for the said defendants at Kingston-upon-Hull, at the said premises of the defendants where they so as aforesaid carried on their said trade or business (the same goods and merchandises so ordered and purchased as last aforesaid then and there being of the price or value of 14*l.* 11*s.*): and the said William Farthing, Son, & Co., then at the time of the said last-mentioned delivery also sent and delivered to the said defendants an invoice or bill of parcels stating therein that the said last-mentioned goods and merchandises were sold by the said William Farthing, Son, & Co., in their own names, and without disclosing the names of the plaintiffs to the defendants, at the price or sum of 14*l.* 11*s.*

*911] Each and every of the said orders and purchases in *manner aforesaid made and given, was an order for and purchase of goods and merchandises of less price and value than 50*l.*; and the consideration for the goods and merchandises delivered as aforesaid by the said William Farthing, Son, & Co., on each and every of the occasions aforesaid, was less than 50*l.*: and the goods and merchandises delivered as aforesaid by the said William Farthing, Son, & Co., at any one of the times aforesaid, or in pursuance of any one of the purchases or orders aforesaid, did not exceed 50*l.*; but there was no general or other by-law made by the defendants, nor by the directors of the said company, nor was there any minute or resolution of any board of directors of

the said company, authorizing any of the said orders or purchases, or delegating to the manager any of the powers given by the said deed of settlement to the directors, other than the following resolutions:—

“Adjourned general meeting, 29th March, 1847.

“The first ordinary general meeting was held this day by adjournment, at the public rooms Jarratt Street, in the borough of Kingston-upon-Hull. William Farthing, Esq., in the chair. Mr. Thomas Wilson moved, that, inasmuch as the duties of the chairman have become so onerous and incessant as fully to occupy the whole of his time and attention, and the salary fixed at the commencement of the company being inadequate to his services, a committee of the following shareholders [naming twelve] be appointed to inquire into the duties performed, and ascertain the remuneration given in other works of a similar character, and to make such arrangements as to amount of salary as will meet the case, and secure to the company the entire services of the chairman. Carried *nem. con.*

(Signed.) “W. FARTHING, Chairman.”

*“Hull Glass Company. Board Room, 5 April, 1847.

“Meeting of the committee appointed at the general meeting [*912 held on the 29th of March last, for the purpose of making such arrangements with Mr. William Farthing, the chairman, as to salary, as will secure his entire services, and carry out the resolution of the meeting.

“Present, Mr. Gresham, in the chair, and nine other members.

“It was resolved, on the motion of Mr. Wake, seconded by Mr. Wilson, that Mr. Farthing be offered 500*l.* per annum for his entire services as general manager, in addition to his salary of 200*l.* as chairman of the company, the same to commence from the date of the general meeting held on the 29th of March last.

“The committee then adjourned, in order that the proposition might be submitted to Mr. Farthing.

(Signed.) “JOHN GRESHAM, Chairman.”

“Hull Glass Company. Board Room, 25th June, 1847.

“At a meeting this day duly convened by circular,—present, Mr. Gresham, in the chair, and eight other members,—after hearing Mr. Farthing’s views upon the proposition, it was resolved, on the motion of Mr. Kemp, seconded by Mr. Clifford, in order to meet Mr. Farthing’s views, and having regard to his past labours and attention, that the amount named in the resolution of the committee meeting of the 5th of April, commence with the financial year, viz. the 1st of January last: upon which Mr. Farthing expressed his satisfaction, and accepted the terms.

(Signed.) “JOHN GRESHAM, Chairman.”

The goods and merchandises so as aforesaid delivered by the said William Farthing, Son, & Co., to and for the defendants, were on the seve-

ral occasions aforesaid sold and delivered by the said William Farthing, Son, & Co., as agents for and on behalf of the plaintiffs, then, at the
 *913] *respective times of the said sales and deliveries thereof, being the true and lawful owners of the said goods and merchandises; and they the said William Farthing, Son, & Co., had not, nor had either of them the said William Farthing the elder, or William Farthing the younger, any title to or interest in the said goods and merchandises, or any part thereof, save and except as such agents as aforesaid for and on behalf of the said plaintiffs.

The goods and merchandises so as aforesaid delivered to and for the defendants, at the respective times when they were so as aforesaid respectively delivered at the said premises of the defendants, were accepted and received as for and on behalf of the said company, by persons in the employment of the said company, and acting in the charge and management of the said trade or business of the said company, and were respectively goods and merchandises of the kind and description used in, and required for the purposes of, the said trade or business, in the manufacturing of glass, and were afterwards and before the commencement of this suit, with the knowledge of the said directors, actually used and employed in the business of the said company, in and for the purposes of their said trade or business, in the manufacturing of glass.

After the delivery of the said several goods, and before the commencement of this suit, to wit, on the 6th of November, 1847, the plaintiffs wrote and sent to the defendants the following letter:—

“London, 6th November, 1847.

“Gentlemen,—We take leave to wait on you with the subjoined memorandum of zaffres and cobalt sold to you on our account by our friends and agents Messrs. William Farthing, Son, & Co., of your place, amounting in all to 177*l.* 8*s.* 6*d.*, and to request that you will do us

*914] *the favour to settle with us for the same at your earliest convenience. (Signed.) “SMITH, GOODHALL, & REEVES.

“Memorandum:—1847, 6th February, 14*l.* 10*s.*, 18th February, 17*l.* 7*s.* 6*d.*, 4th March, 14*l.* 12*s.*, 21st April, 14*l.* 11*s.*, 4th May, 14*l.* 11*s.*, 10th May, 14*l.* 11*s.*, 17th May, 14*l.* 11*s.*, 31st May, 14*l.* 11*s.*, 6th August, 14*l.* 11*s.*, 24th August, 14*l.* 11*s.*, 27th August, 14*l.* 11*s.*,—in all, 177*l.* 8*s.* 6*d.*”

The parcels of goods mentioned in the above letter were the goods and merchandises hereinbefore mentioned to have been sold and delivered as aforesaid: and, in answer thereto, Carlill, so being such secretary as aforesaid, afterwards and before the commencement of this suit, to wit, on the 9th of November, 1847, as such secretary, wrote and sent to the plaintiffs the following letter:—

“The Hull Glass Company,
“Hull, 9th November, 1847.

“Gentlemen,—Your letter of the 6th instant is to hand, and shall be laid before the board of directors of the company at their first meeting.
(Signed.) “WILSON CARLILL, Secretary.”

On the 15th of April, 1848, the plaintiffs addressed and sent another letter to the defendants, referring to the price of the goods mentioned in their former letter, and concluding,—“We cannot, however, admit your right to dispute now the payment of the claim for 177*l.* 8*s.* 6*d.*, made so long ago as the 6th November last, and recognised by your secretary’s letter to us of the 9th of that month, which claim we accordingly place in the hands of our solicitors.”

The writ was issued on the 9th of May, 1848, claiming by the endorsement 177*l.* 8*s.* 6*d.*, with interest thereon from that day.

*The points marked for argument on the part of the plaintiffs, [915 were,—that, upon the facts found by the special verdict, they were entitled to maintain the action, and to have the verdict entered for them for the price of the goods in question, and also for interest thereon.

The points marked for argument on the part of the defendants, were as follows:—“That the defendants, who are a joint-stock company completely registered under the 6 & 7 Vict. c. 110, are not liable for the goods stated in the declaration to have been sold and delivered to them, the requisites of such act not having been complied with:

“That the 7 & 8 Vict. c. 110, s. 44, regulates contracts entered into on behalf of a joint-stock company completely registered under that act; and that, by that section, every such contract, except for the purchase of any article not exceeding 50*l.*, must be in writing, and signed by two at least of the directors of the company on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company, on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case; and that every such contract for the purchase of any article not exceeding 50*l.*, entered into on behalf of any such joint-stock company, may be entered into by any officer authorized by a general by-law in that behalf; and that it appears by the special verdict, that the contracts were for articles not exceeding 50*l.*, and that there was no general or other by-law made by the defendants, nor by the directors of the said company, nor was there any minute or resolution of any board of directors of the said company, authorizing any of the orders or purchases of the said goods, or delegating to the manager any of the powers given by the deed of settlement to the directors, other than the resolutions set forth in the special verdict:

*916] **“That, by the 7 & 8 Vict. c. 110, s. 27, the directors are authorized to conduct and manage the affairs of the company according to the provisions, and subject to the restrictions of that act, and of the deed of settlement, and of any by-law, and, for that purpose, to enter into all such contracts as the circumstances may require, subject, nevertheless, to the provisions and restrictions of that act, and to the provisions of the deed of settlement of the company:*

“That, by s. 74 of the deed of settlement, the directors are empowered to delegate to the manager such and so many of the powers by the deed of settlement given to the directors, as will enable him to carry on the said works and manufacturing business in an efficient manner; and that it appears by the special verdict that no such power ever was delegated to the manager; and, even if such power were delegated, the deed of settlement cannot control the express words of the act of parliament with reference to contracts of this description:

“And that, by clause 120 of the deed of settlement, the directors are empowered to delegate all or any of the powers by that deed conferred on them to any one or more of their body who may be employed as a committee or deputation, on any matter of business for or on behalf of the company; and that it appears by the special verdict that there never was such a delegation; and that, even had such delegation taken place, the deed of settlement could not control the express words of the act of parliament with reference to contracts of this description.”

Bovill (with whom was *Butt*), for the plaintiffs.—This is an action to recover the price of goods supplied to the defendants, a company established for trading purposes, the goods having been supplied in small quantities (of less value than 50*l.* each), upon the order of the manager, the chairman, the deputy-chairman, and the secretary, and delivered at *917] the company's place of business, and *used by them in their trade. When the case was before the court upon a former occasion,^(a) the court thought there was nothing to prevent the company from ordering goods like any other trading partnership, and that they were liable unless there was something in the 7 & 8 Vict. c. 110, or in their deed of settlement, to limit their liability; and that the proof of such limitation of liability lay upon them. If this were an ordinary corporation, irrespectively of the statute and the deed of incorporation, there can be no doubt that they would be liable for these goods. Formerly, a corporation could only contract under seal, except in respect of matters of trivial amount and of every day's occurrence. Recent decisions, however, have materially qualified that rule. In *Beverley v. The Lincoln Gas-Light Company*, 6 Ad. & E. 828 (E. C. L. R. vol. 33), 2 N. & P. 283, *PATTESON, J.*, giving the judgment of the court says: “At first, the rule appears to have been exclusive, as, indeed, its principle

(a) 8 C. B. 668 (E. C. L. R. vol. 65).

required it to be. A corporation, it was said, being merely a body politic, invisible, subsisting only by supposition of law, could only act or speak by its common seal. the common seal, in the words of Peere Williams, in *Rex v. Bigg*, 3 P. Wms. 423, was the hand and mouth of the corporation. The rule therefore stood, not upon policy, but on necessity, and was of course equally applicable to small as to great matters; to acts of daily or of rare occurrence; to what regarded personal, as well as real property. But this, though true in theory, was intolerable in practice; the very act of affixing the seal, of lifting the hand, or opening the mouth, could only be done by some individual member, in theory quite distinct from the body politic, or by some agent; the management of the corporate property, the daily sustentation of the members, the performance of the very duties for which the corporation was created, required incessantly that acts should be done, sometimes of daily recurrence, *sometimes entirely unforeseen, yet admitting of no delay, sometimes of small importance, or relating [*918] to property of little value. The same causes also required that contracts to a small amount should often be entered into. In all these cases, to require the affixing of the common seal, was impossible; and therefore, from time to time, as the exigencies of the case have required, exceptions have been admitted to the rule: and what we desire to draw attention to is this,—that these exceptions are not such as the rule might be supposed to have provided for, but are in truth inconsistent with its principle, and justified only by necessity. As each exception of this kind was made, it was not unnatural that the rule in all other yet unforeseen cases should receive confirmation, though it would be hardly fair to anticipate thence what the opinions of the judges would have been if the cases had been presented before them and required their decision.” [JERVIS, C. J.—That has been since very much qualified in the Exchequer: *Diggle v. The London and Blackwall Railway Company*, 5 Exch. 442.†] Lord DENMAN, in delivering the judgment of the court in *Church v. The Imperial Gas-Light Company*, 6 Ad. & E. 846, 861 (E. C. L. R. vol. 33), 3 N. & P. 35, says: “The general rule of law, is, that a corporation contracts under its common seal: as a general rule, it is only in that way that a corporation can express its will or do any act. That general rule, however, has from the earliest traceable periods been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit, that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience amounting almost to necessity. Wherever, to hold the rule applicable would occasion very great inconvenience, *or tend to defeat the very object for which the corporation was [*919] created, the exception has prevailed: hence, the retainer by parol

of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions; on the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon." This received the sanction of the Court of Exchequer in *The Mayor of Ludlow v. Charlton*, 6 M. & W. 815, 822.† And none of the later decisions in any degree break in upon the doctrine so laid down. If the 7 & 8 Vict. c. 110, and the company's deed of settlement, had not interposed, there could be no doubt as to the liability of the defendants: indeed, the court upon the former occasion decided that. (a) Reliance will probably be placed upon the 44th section of the statute, which, "for the purpose of regulating contracts entered into on behalf of any joint-stock company completely registered under this act (except contracts for the purchase of any article the payment or consideration for which doth not exceed 50*l.*, or for any service the period of which doth not exceed six months, and the consideration for which doth not exceed 50*l.*, and except bills of exchange and promissory notes)," enacts, "that every such contract shall be in writing, and signed by two at least of the directors of the company on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case; and that, in the absence of such requisites, or of any of them, any such contract shall be void and ineffectual (except as against the company on whose behalf the same shall

*920] have *been made); and that every such contract for the purchase of any article the consideration of which doth not exceed the sum of 50*l.*, or for any services the period of which doth not exceed six months, and the consideration for which doth not exceed 50*l.*, entered into on behalf of any joint-stock company completely registered under this act, may be entered into by any officer authorized by a general by-law in that behalf; and that every such contract, whether under seal or not, shall, immediately after the same shall have been entered into, be reported to the secretary or other appointed officer of the company on whose behalf the same shall have been entered into, who shall enter the same in proper books, to be kept for that purpose; and that, if any such contract be not so reported and entered, then the officer by whose default such contract shall not be so reported or entered, shall be liable to repay to the company on whose behalf such contract may be made, the amount of the consideration agreed to be paid by or on behalf of such company in respect of such contract." The 45th section relates to the manner in which bills and notes are to be made or drawn, accepted, or endorsed, by the company; and the 46th section to deeds and instruments under seal.

(a) 8 C. B. 668 (E. C. L. R. vol. 65).

The language of the 44th section, it is submitted, is, as to contracts like the present, permissive, giving the company powers which before they did not possess: and, even as to contracts exceeding the value of 50*l.*, they may be binding upon the company, though not made with all the prescribed formalities. [MAULE, J.—You say, that, if the company wish to clothe themselves with certain rights in respect of such contracts, they must observe the required formalities; but that, if they, who know the proper form, neglect to adopt it, though they may lose certain advantages, they do not thereby become absolved from the liability to perform the contracts?] Precisely so. The 4th paragraph of section 25, empowers the company, when completely registered, “to enter into contracts for the *execution of the works, and for the supply of the stores, or for any other necessary purpose of the company:” the 12th enables [*921 them “to perform all other acts necessary for carrying into effect the purposes of such company, and in all respects as other partnerships are entitled to do;” and the 13th “to appoint, from time to time, for the conduct and superintendence of the execution of the affairs of the company, a number of directors, not less than three, for a period not greater than five years, with or without eligibility to be re-elected at the expiration of the term, as may be prescribed by any deed of settlement or by-law.” And the 27th section, which regulates the powers and duties of the directors, enables them to conduct and manage the affairs of the company according to the provisions and subject to the restrictions of the act, and of the deed of settlement, and of any by-law, and for that purpose to enter into all such contracts and do and execute all such acts and deeds as the circumstances may require; and also to appoint and remove the secretary, clerks, and servants; and to appoint other persons for special services, as the concerns of the company may from time to time require,—“subject, nevertheless, to the provisions and restrictions of this act, and to the provisions of the deed of settlement of the company, or other special authority, but not so as to enable the shareholders to act in their own behalf in the ordinary management of the concerns of the company, *otherwise than by means of directors.*” Then, there is nothing in the deed of settlement,—which gives the directors extensive powers and large discretion as to the mode of conducting the business of the company, enabling them to appoint a chairman and deputy-chairman, a secretary, and a manager of the works to carry on and transact the manufacturing concerns of the company, with power for the board of directors (by s. 74) to delegate to such manager such and so many of the powers thereby given to them *as will enable him to carry on the works and manufacturing business in [*922 an efficient manner, and (by s. 116) to act in such manner as shall appear to them best calculated to promote the interests of the company,—to exclude the mode of dealing which appears to have prevailed in this case. And, the goods having been delivered to the company, and used

by them in their business, it is not competent to them now to say that the persons by whom the orders were given were not authorized to give such orders: *The Mayor, &c., of Stafford v. Till*, 4 Bingh. 75 (E. C. L. R. vol. 13, 15), 12 J. B. Moore, 260 (E. C. L. R. vol. 22); *Tilson v. The Warwick Gas-Light Company*, 4 B. & C. 962 (E. C. L. R. vol. 10), 7 D. & R. 376 (E. C. L. R. vol. 16); *Hall v. The Mayor, &c., of Swansea*, 5 Q. B. 526 (E. C. L. R. vol. 48), 1 D. & Meriv. 475; *Ridley v. The Plymouth, &c., Grinding and Baking Company*, 2 Exch. 711.† [MAULE, J.—If it be a condition-precedent to the liability of the company, that they should in contracting have complied with all that the statute and the deed of settlement require, practically there would be no remedy against them upon contracts made without a strict compliance with all those requisites.] That surely could not have been the intention of the legislature.

Hugh Hill (with whom was *Byles*, Serjt.), contrà.—The question here is, whether the facts stated in the special case furnish evidence of a contract binding on the defendants. Speaking of the 7 & 8 Vict. c. 110, PARKE, B., in *Ridley v. The Plymouth, &c., Grinding and Baking Company*, says: “I am satisfied, that, under this act of parliament, these quasi corporations are bound by their contracts, though not under seal, and though they have not complied with the requisites of the 44th section. That section contains a clause, ‘that, in the absence of such *923] requisites, or any of them, such contract shall be *void and ineffectual, *except as against the company on whose behalf the same shall have been made.*’ If, then, this contract has in fact been made by the company, they cannot object that it was not under seal; but it is competent for them to say that the contract was not made by their agents having authority to bind them. In an ordinary partnership, at common law, and by usage of trade, one partner has power to bind his copartners in all contracts within the scope of the partnership dealing. But, with regard to these joint-stock companies, which are for some purposes a partnership consisting of a great number of individuals, the same rule does not apply; for instance, one member could not bind the company by signing a bill of exchange, or entering into other similar contracts. The question then is, who has authority to bind them? Now, the 7 & 8 Vict. c. 110, s. 7, provides that there shall be no complete registration of such a joint-stock company, until a copy of their deed of settlement shall have been delivered to the registrar of joint-stock companies. It is, therefore, competent to every person dealing with such a company to ascertain the objects of the company; for, the deed must specify them, and also who the directors are; and any person may find in that deed the duties of the directors and their powers as between them and the company. Therefore, every person seeking to bind the company by a contract with the directors, must give some proof of their authority.” Here, according to the provisions of the act

of parliament and of the deed of settlement, the company had no power to contract otherwise than by the directors acting as a board. The 69th and 70th clauses of the deed evidently show that the power of purchasing or contracting for goods was not necessarily incident to the office of manager. Such a power might, indeed, have been delegated to him by a board of directors; but the case expressly finds that there was no such delegation. And, as to the orders given by *the chairman, deputy-chairman, and secretary, there can be no doubt [*924 of their being wholly unauthorized. In *Homersham v. The Wolverhampton Waterworks Company*, 6 Exch. 137,† the plaintiff, an engineer, entered into a contract under seal with the Wolverhampton Waterworks Company for the supply of machinery and the execution of works for the purposes of the company, with certain provisions as to extra work. The company was incorporated subject to the general provisions of the 8 & 9 Vict. c. 16; but by the special act(a) three directors were made a quorum. Much extra work was done by the plaintiff, with the sanction of the engineer of the company, but not according to the provisions of the contract; and, after the work was done, and a claim made by him for payment of the price stipulated in the contract, together with a further sum for the extra work, a sum of 1000*l.* was paid to him on the general account; but no proof was given that the payment was made by the order of three directors. In an action brought for the extra work, it was held that there was no evidence to go to the jury of any contract with the company. POLLOCK, C. B., in delivering the opinion of the court, said: "These clauses of restriction, and indeed the whole common law distinction by which a corporation can only be bound by a contract under seal, being made for the benefit of subscribers to works of this description, that their interest may be protected, we are of opinion that they can only contract, either under a seal if they are a corporation, or, if they are a body established under any special act of parliament, they can only contract according to the terms by which the contract is entered into by the clause of the special act, or of a general act which controls them. They cannot contract, except under the authority of these clauses." [CRESWELL, J.—Is it necessary that the contract *should be made at a board, provided all [*925 the directors assent to it?] The provisions of the deed which regulates and defines the powers and the duties of the directors, would seem to require that all acts of the directors should be the acts of the board. The mere circumstance of the company having used the goods for the purposes of their business, would not of itself operate as a recognition of the contracts.

Bovill was heard in reply.

JERVIS, C. J.—I am of opinion that the plaintiffs are entitled to judgment. If this question had been raised on a special verdict, it

(a) 8 & 9 Vict. c. cxxxv.

might perhaps have been necessary to enter into a discussion which now becomes irrelevant. The consent of the parties to take the opinion of the court as upon a special case has materially narrowed the discussion. The plaintiffs' claim is in respect of goods contracted for by four different persons, namely, the chairman of the company, the deputy-chairman, the manager, and the secretary. With respect to the goods ordered by the manager, I apprehend the case falls within the rule as to joint-stock companies, in its strictest sense. Looking at the 69th article of the deed of settlement of this company, there can be no doubt that the directors were authorized to appoint a manager of their works, to superintend and transact, under the control of the board of directors, the manufacturing business of the company. It was conceded by Mr. *Hill* that that, if unqualified, would give such manager authority to purchase materials necessary for the manufacture in which the company was engaged: but it was insisted that this power is limited and controlled by subsequent provisions of the deed. In this I do not concur: nor can I agree with the construction put by Mr. *Hill* upon the 74th article, which *926] provides that the board of directors may, if they think proper, *delegate to the manager such and so many of the powers thereby given to them, as will enable him to carry on the said works and manufacturing business in an efficient manner. It is quite consistent with a special delegation of authority under this article, that the manager should at the same time possess a general power to deal in the manner in which he has assumed to deal here.

The orders given by the chairman, the deputy-chairman, and the secretary, give rise to a different question. Joint-stock companies, it is now admitted, are not to be treated as ordinary trading partnerships: they are only bound by contracts made by the directors within the scope of their authority. The public have no right to complain. They know that the company is acting under the sanction and direction of an act of parliament and of a deed of settlement; and they have a ready access to that deed. But, beyond that, the public have no power, no means of knowledge. It may be sufficient if the public are satisfied that the directors have authority under the deed to appoint a manager, and they see a man acting in that character. But upon that point I wish to pronounce no opinion. The ground upon which I am disposed to hold the company liable in respect of the goods supplied on the orders of the chairman, the deputy-chairman, and the secretary, is, that these orders were subsequently adopted by the directors. The goods were delivered upon the premises, to persons acting in the management of the business of the company, and, it must be assumed, with the knowledge of the directors, and were used in the manufacture for which the company was established. That would be equivalent to a fresh order by the directors, and would entitle the plaintiffs to recover. There is no pretence for saying that it was necessary the orders should be given by "a board."

I therefore think the plaintiffs are entitled to recover in respect of all the goods,—in respect of those ordered *by the manager, [*927 because he was a person duly authorized by the directors under the provisions of the deed of settlement to order goods,—and in respect also of those ordered by the other parties, because, though the original orders were unauthorized, the contracts were afterwards sanctioned and adopted by the directors.

MAULE, J.—I also am of opinion that the plaintiffs are entitled to a verdict for the full sum claimed. The defendants are a company acting under the act for the registration, incorporation, and regulation of joint-stock companies, and under a deed of settlement. These enable them to carry on the business of the company in a particular way, viz., by *directors*. It is consistent with law that the company should have all the liabilities that are fitly incident to those who carry on trade. Here, the directors are by the act of parliament and the deed of settlement empowered to appoint as many managers as they should think fit, to superintend and transact their manufacturing business. To some extent, no doubt, these joint-stock companies differ from ordinary partnerships. The statute 7 & 8 Vict. c. 110, requires the deed of settlement to be registered, and that defines the purposes for which the company is incorporated, and the powers of the directors; and all persons who contract with the directors must be taken to be cognisant of the extent of the authority conferred upon them. But it by no means follows that they are to be taken to be cognisant of all the proceedings of the board of directors. Any person looking at this deed would see that the directors of this company were authorized to carry on the business of manufacturing glass; and that it was competent to a board of directors to appoint a manager for that purpose. There was nothing in this case to show that the plaintiffs had any means of discovering that the persons who received their goods were not duly authorized on behalf of the *company to receive them. On the contrary, the act of parliament and the deed of settlement enable [*928 the company to carry on their business through the agency of persons to be appointed by them. Whether or not the persons so appointed were regularly appointed, the plaintiffs, or any other persons dealing with them, could have no means of knowing: they have no power to inspect the minute-book. Here are persons found transacting business and receiving goods upon the company's premises, and using them for the purposes of the company; and all this with the knowledge of the company. I do not know that there is any material difference between the ground I take and that taken by the lord chief justice. What he calls the knowledge of the directors, I call the knowledge of the company. This is the simple case of an individual, or a body corporate, carrying on business in the ordinary way, by the agency of persons apparently authorized by him or them, and acting with his or their

knowledge. The case differs in no respect from the ordinary one of dealings at a shop or counting-house: the customer is not called upon to prove the character or the authority of the shopman or clerk with whom he deals; if he is acting without or contrary to the authority conferred upon him by his employers, it is their own fault. It seems to me, therefore, that these defendants are bound by the acts of the persons who have taken upon themselves, with their knowledge, to act for them in ordering the goods in question, and receiving them, and using them in their business. If this had been simply the case of a contract made with persons who were incompetent to contract, that would have approximated it more to the case of *Homersham v. The Wolverhampton Waterworks Company*, 6 Exch. 237.† It differs, however, most materially and essentially from that. Every presumption here is to be made in favour of the plaintiffs, that the goods were *929] ordered, *as well as received and enjoyed, by the company. The plaintiffs could only know that the directors had power to appoint persons to perform the duties they appeared to be doing; and they had a right to assume that they were duly and properly appointed.

CRESSWELL, J.—I also am of opinion that the plaintiffs are entitled to recover. With respect to the first parcel of goods, it appears that they were ordered by the manager, and were sent to the premises occupied by the defendants, and used in the business there carried on by them. The person described in the case as the manager, must be assumed to have been an officer properly constituted, under the 69th article of the deed of settlement, to superintend and transact the manufacturing business of the company,—incident to which, of course, would be the power to order goods necessary for that purpose. The remaining orders were given by the chairman, the deputy-chairman, and the secretary. Now, I do not say it was strictly competent to either of these persons to give such orders; but it appears that the goods were delivered at the premises of the company, with invoices stating them to have been sold to the company; and the deed contains a provision (s. 117) as to the custody and care of books and papers at the company's offices: we cannot fail, therefore, to assume that the directors knew of the transactions. That being so, and they having allowed the goods to be used for the purpose of their business, the defendants are clearly liable. This is equivalent to the act of *all* the directors, and therefore gets rid of the objection that it was not done by a “board of directors.”

WILLIAMS, J.—I am of the same opinion. The case finds that the goods in question were all delivered upon the premises of the company, and received there by persons having the charge and management of *930] their business, *and, with the knowledge of the directors, used in the manufacture in which they were engaged. I think the

evidence puts the case upon the same footing as if the goods had been ordered by all the directors; and I think there can be no doubt that the company would be liable for an order so given. The cases in the Exchequer are clearly distinguishable.

Judgment for the plaintiff, for 177l. 8s. 6d.

MACDONNELL v. EVANS. Jan. 23.

A witness cannot, upon cross-examination, even for the purpose of discrediting him, be asked as to the contents of a written paper which is neither produced nor its absence accounted for. Therefore, where a witness was asked, upon cross-examination,—a letter in his own handwriting being shown to him,—“Did you not write that letter in answer to a letter charging you with forgery?”—Held, that the question was inadmissible for any purpose, inasmuch as it was an attempt to get at the contents of a written document which for anything that appeared might have been produced.

THIS was an action of assumpsit upon a bill of exchange, by endorsee against acceptor.

The cause was tried before JERVIS, C. J., at the sittings in London after last Trinity Term. A witness called on the part of the plaintiff, being asked on cross-examination by the defendant's counsel, who produced a letter purporting to be written by the witness,—“Did you not write that letter in answer to a letter charging you with forgery?”—the counsel for the plaintiff objected, that, inasmuch as this was an attempt to get in evidence the contents of a written paper without producing the paper itself, the question was not admissible.

The Lord Chief Justice, holding the objection to be a good one, refused to allow the question to be put: and the plaintiff had a verdict.

Bramwell, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the evidence was improperly rejected.

**Byles*, Serjt., and *Cleasby*, now showed cause.—The question was properly disallowed. It was seeking by indirect means to [*931 get in the contents of a written document, without producing it or accounting for its non-production: and the law is the same whether the matter arises on examination in chief or on cross-examination. In *Taylor on Evidence*, vol. I. p. 292, the rule is thus stated:—“Oral evidence cannot be substituted for *any writings the existence or contents of which are disputed*, and which is *material, either to the issue between the parties, or to the credit of the witnesses*, and is not merely the memorandum of some other fact. Thus, a witness cannot be asked whether certain resolutions were published in the newspapers, (a) neither can he be questioned as to the contents of his account-books; (b) but, in both these cases, the papers and the books, as being the best evidence, must be produced. So, doubts have been entertained as to whether the con-

(a) *The Queen v. O'Connell, Armstr. & Trev.* 163.

(b) *Id.* 198.

tents of hand-bills written by dictation at a meeting of conspirators, could be proved by oral testimony. (a) So, the fact of rating cannot be legally proved without the production of the rate-books. (b) So also, a witness, on cross-examination, cannot be asked whether he has made certain statements in writing; but the proper course is, to put the document into his hands, and ask him whether he wrote it." In *The Queen's case*, 2 Brod. & B. 286 (E. C. L. R. vol. 6), the following questions were proposed by the House of Lords to the common law judges,—“First, whether, in the courts below, a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with *932] such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter? Secondly, whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of, or one or more lines of such letter, and not the whole of it, whether he wrote such part, or such one or more lines; and, in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?” To the first (and incidentally to a part of the second) of these questions, the learned judges, per ABBOTT, C. J., returned the following answer:—“The judges are of opinion that that question must be answered by them in the negative; and the reason and foundation of our opinion is shortly this. The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is, to ask the witness whether or not that letter is of the handwriting of the witness? If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and, when that letter is produced, then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments, is, in order that the court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining counsel may put the court in possession only of a part of the contents of the written paper; and thus the court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a *933] statement of a part.” Here, the question arises upon a letter to the witness: but the same objection applies. [MAULE, J.—If you want the jury to know that there was a letter containing

(a) *The King v. Thistlewood*, 33 Howell's St. Tr. 756—759.

(b) *Rex v. Coppull*, 2 East, 25; recognised by PATTESON, J., in *The Queen v. Staple Fitzpaine*, 2 Q. B. 494 (E. C. L. R. vol. 42), 1 Gale & D. 605.

a charge of forgery, the proper way to do so, is, by producing the letter itself.] The rule is not confined to the case of an inquiry as to the contents of a document material to the matters in issue in the cause, as is suggested on the other side: it is equally applicable in cases where it is sought to discredit the witness. In Phillips on Evidence, 9th edit. vol. I. p. 422, the rule is thus clearly laid down:—"Oral evidence cannot be substituted for any instrument in writing (which is not merely the memorandum of some other fact), the existence of which instrument is disputed, and its production material to the issue between parties, *or to the credit of the witnesses*. One advantage derived from the application of this rule, is, that the court acquires a knowledge of the whole contents of the instrument, which may have an effect very different from a statement of a part. 'I have always,' says Lord TENTERDEN, in *Vincent v. Cole*, M. & M. 258 (E. C. L. R. vol. 22), 'acted most strictly on the rule that what is in writing shall only be proved by the writing itself; my experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule.' It was decided in *The Queen's case*, that it is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or to the like effect; because the counsel might thus put the court in possession of a part only of the contents of a written paper. And, even if the witness acknowledges the letter to be in his handwriting, he cannot be questioned as to its contents, but the whole letter must be read in evidence."

**Bramwell* and *Macnamara*, in support of the rule.—With regard to evidence that is material to the issue, or evidence to [*934 contradict a witness, the rule may very well be, that, if it is sought to do this through the medium of a written document, the document itself must be produced. But, there is a third class of evidence, viz. where it is sought, not to contradict, but merely to discredit the witness: and it was with this view that the question here objected to was proposed to the witness. [MAULE, J.—Could you ask a witness,—“Have you not sent a letter to A. B. threatening to charge him with the commission of a crime, with a view to extort money from him?”] Such a question, it is submitted, would be perfectly legitimate. It was sought here to show that the witness was disgraced by something in writing. A letter was put into his hand, and he was asked if he did not write that letter in answer to a letter charging him with forgery. The letters could not be produced after the witness had left the box. [MAULE, J.—Suppose the witness had said,—“I did write this letter in answer to another, which is in court,”—good sense obviously requires that the

latter should be produced, if it is wished to get at its contents.] Even primary evidence of the contents of the letter could not have been given for the purpose of contradicting the witness; it was not relevant to the issue. The Queen's case does not necessarily govern this. The difference between a question addressed to the establishing a fact in issue in the cause, and one going to the credit of the witness, was not pointed out in argument before the judges there: the facts of the case did not raise it. Besides, the House of Lords was not then sitting judicially, but with a view to legislation. [CRESSWELL, J.—The judges were required to state what they would do upon such a question coming before them judicially; not merely to state their opinion as to a matter of legislation.] At all events, it is an opinion which has not all the

*935] *binding force of a decision of the court of ultimate appeal. The grounds of the opinion were, that the best evidence ought to be produced, and that the court should be put in possession of the whole document. That rule is perfectly correct, where the object is to establish a fact material to the merits, by means of the document. But it is a very different thing where the fact is wanted merely for the purpose of discrediting a witness, or to test the accuracy of his memory. The reason for the distinction is obvious: a party may fairly be supposed to come prepared to answer the facts that are in issue, but not to meet a witness or a document which is put upon him suddenly. A witness may be asked on cross-examination whether he has not been convicted. [CRESSWELL, J.—If objected to, it is always disallowed.] In Russell on Crimes, vol. II., p. 927, it is said,—“As to questions which are asked, upon cross-examination, for the purpose of throwing discredit on a witness, and which tend merely to disgrace and degrade him, without subjecting him to a penalty or criminal charge, the authorities are conflicting on the point whether he is compellable to answer them.” Again, p. 931, it is said: “The rule which requires the best evidence to be produced of which the nature of the thing is capable, is, it should seem, in some degree relaxed *in regard to cross-examination for the purpose of discrediting a witness; for, the rule is to be understood as applicable only to the proof of the issue, or some fact material to the issue.* Thus, it is usual in practice to ask, in cross-examination, an accomplice or other witness who appears against a person on a criminal prosecution, whether he has not been tried for some offence; although the fact of his having been tried for such an offence is partly matter of record, and, therefore, according to the general rule, not to be proved

*936] without the record, which is the *highest species of proof.” For this the learned author cites the 7th edit. of Phillipps on Evidence, vol. I., p. 301. [JERVIS, C. J.—That passage does not appear in the 9th edition.] In Taylor on Evidence, vol. II., p. 965, it is said, that, “with the view of discrediting the testimony of a witness, he may

be always *asked*, on cross-examination, (a) though he is not always compelled to answer, *questions with regard to alleged crimes*, or other improper conduct, *on his part*; and here, if the fact inquired into be relevant to the issue, it may be proved by other evidence, although denied by the witness; but, if it be irrelevant, the answer of the witness will be conclusive. (b) The same rule prevails with respect to all other questions put to a witness for the purpose of *directly testing his credit*; that is, if the questions relate to relevant facts, the answers may be contradicted by independent evidence; if to irrelevant, they cannot." [MAULE, J.—This is quite a different matter: the question is, how far you can get at the contents of a written document without producing it. JERVIS, C. J.—The question is discussed in Starkie on Evidence, 3d edit. vol. I., pp. 192, *et seq.*, and the result seems to be that I was right in refusing to allow the question.] Mr. Taylor assumes that the case of *Slatterie v. Pooley*, 6 M. & W. 664,† has made some difference: he says, (c) "With respect to questions which directly degrade the witness, no objection can be taken to them, on the ground that they involve the fact of a previous conviction, which ought to be proved by the production of the **record*; because, as the parol admissions of parties are now [*937 receivable in evidence, although they relate to the contents of deeds or records, (d) the same rule would seem to render the answers of a witness admissible in the case just put." [CRESSWELL, J.—There is this striking difference between the two cases: a party is allowed to affect his own rights by parol admissions; but here, the admission would affect the parties in the cause. Taylor and Phillipps both agree that the conviction must be properly proved.] In examining a witness on the *voire dire*, he may, for the purpose of showing him interested, be examined as to the contents of a written document, though it is not in evidence. Upon what principle, then, can such evidence be excluded, where it is sought merely to discredit the witness? [CRESSWELL, J.—Where a witness is examined as to his interest, upon the *voire dire*, you may examine another witness upon that matter; but, could you examine *that* witness as to the contents of a written instrument?] The rule as to examinations on the *voire dire*, is thus stated in Russell: (e) "An examination on the *voire dire* is allowed to be conducted without strict regard to the general rule of evidence, which requires the best possible proof of a fact, and admits no other. Thus, a man may be examined as to the contents of a written document, without a notice to produce;

(a) *Harris v. Tippet*, 2 Campb. 638, *Rex v. Yewin*, 2 Campb. 639, *Rex v. Edwards*, 4 T. R. 440, *Rex v. Barnard* and *Rex v. James*, cited 1 C. & P. 86, n., 87, n., *Rex v. Watson*, 2 Stark. N. P. C. 149 (E. C. L. R. vol. 3), 32 How. St. Tr. 292.

(b) *Rex v. Watson*, 2 Stark. N. P. C. 149, 32 How. St. Tr. 486—495, *Rex v. Rudge*, Peake's Add. Cas. 232.

(c) Vol. II. p. 975.

(d) Citing *Slatterie v. Pooley*, 6 M. & W. 664,† and *Earle v. Picken*, 5 C. & P. 542 (E. C. L. R. vol. 24).

(e) Vol. II. p. 987.

for, the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection." [MAULE, J.—In many cases witnesses are called whom the opposite party has no reason to expect to see: the reason, therefore, given in that book is not a good one. An examination on the *voire dire* is for the purpose of establishing something *938] *of which the court is to be the judge, and not the jury. It may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury. Here, the jury were to be convinced that the contents of a certain letter were so and so.] It was not proposed to prove the contents of the letter: all the defendant's counsel wanted, was, the witness's denial or admission. In *Ridley v. Gyde*, 1 M. & Rob. 197, it was held, that a witness, on cross-examination, may admit not having mentioned a fact on a former examination, though that examination is in writing, and not produced. [MAULE, J.—The object there was, to show that the witness did not mention the fact, not to show the contents of the examination. Suppose a man is asked whether he made an entry in his day-book, and he says no; it cannot be necessary to produce the book. In criminal cases, where a witness is asked as to something *he has said* before the magistrate, the depositions are always put in.] The rule as to depositions was laid down at a meeting of the judges after the passing of the 6 & 7 W. 4, c. 114, the act for allowing prisoners charged with felony to make full defence by counsel.(a) [MAULE, J.—The judges there were merely stating what the law was, not laying down any new rule of evidence.] The mere fact of what a party has said, being taken down in writing, does not make what he said inadmissible: therefore, the rule thus introduced by the judges was a new rule altogether. Mr. Starkie,(b) who discusses this subject with great ability, treats it as an open question, and wholly unaffected by the opinion of the judges in *The Queen's case*. And in 2 Taylor on Evidence, 959, it is said,—“This rule,(c) excluding as it does, one of the best tests by which the memory and *939] *integrity of a witness can be tried, has been much censured; and Lord BROUGHAM has not hesitated to state that it cannot ‘be defended upon any principle, or regarded as otherwise than founded on a gross fallacy.’ His lordship, on another occasion, observed with much force,—‘If I wish to put a witness's memory to the test, I am not allowed to examine him as to the contents of a letter or other paper which he has written. I must put the document into his hands, before I ask him any questions upon it; though, by so doing, he at once becomes acquainted with its contents, and so defeats the object of my inquiry. That question was raised and decided in *The Queen's case*,

(a) See 7 C. & P. 676 (E. C. L. R. vol. 32)

(b) 1 Stark. Evid. 202—207.

(c) The rule supposed to be established by *The Queen's case*.

after solemn argument, and, I humbly venture to think, upon a wrong ground, namely, that the writing is the best evidence, and ought to be produced, though it is plain that the object here is by no means to prove its contents. Neither am I, in like manner, allowed to apply the test to his veracity: and yet, how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him to the contents of a letter written by him, and which he believes to be lost?" In *Ewer v. Ambrose*, 3 B. & C. 746, 749 (E. C. L. R. vol. 10), 5 D. & R. 629 (E. C. L. R. vol. 16), BAYLEY, J., says: "I doubt whether the defendant was at liberty to put in the answer in Chancery of the witness, in order to discredit him. It was competent to the plaintiff, in cross-examination, to have asked the witness if he had sworn, in his answer in Chancery, contrary to the fact he was then deposing to; and, if he had said that he had not, then the plaintiff, in order to discredit him, might have given the answer in evidence; but he could not do so without putting the preliminary question to him." [CRESSWELL, J.—That is inconsistent with the ruling in *The *Queen's case*.] [*940] The *Queen's case* is altogether inapplicable here: we could not have produced the letter as part of our case; all we could do, would be, to put it into the hands of the witness before asking the question: and as we could not put it in as part of our case, why are we to put it in through the medium of the witness? (a)

JERVIS, C. J.—I am of opinion that this rule should be discharged. It is unnecessary, as it seems to me, for the court to lay down any general rule upon this subject; it is enough to dispose of the question which was raised at the trial. If even it had been necessary for us to declare *the general principle, we should not have permitted our- [*941] selves to be influenced by the suggestion of hardship, to bend the rule to meet the supposed justice of the particular case. The question put and objected to at the trial, was this,—“Did you not write that

(a) The following pertinent remarks on this subject are made in *Best's Principles of Evidence*, p. 349:—“The rule that an advocate who has a document in his possession shall not represent its contents to a witness, may possibly be defended on the ground, that, whoever uses a document in a court of justice, has no right to suppress any part of it, or prevent its speaking for itself; although the fitness of extending even this principle to evidence *extra causam* is not beyond dispute. But whether a witness may be asked, *with a view to test his memory or credit*, if he has ever made a representation, not specifying whether verbal or written, or has written a letter, not saying to whom, when, or under what circumstances, in which representation or letter he has made statements inconsistent with the evidence given by him *in causâ*, is a much larger question. Some authorities consider that the above answers of the judges (in *The Queen's case*, 2 B. & B. 286 (E. C. L. R. vol. 6),) have not resolved it in the negative, and that they are all based on the assumption that the letter is in the possession of the cross-examining counsel. In practice, however, a different construction is put on them; and we should at once dismiss the subject, had not that practice been condemned by the text-writers on the law of evidence, and the above answers of the judges made matter of much animadversion. And here it may be doubted how far the proceedings in *Queen Caroline's case* are binding on tribunals, the answers of the judges to the House of Lords having no binding force *per se*; and although, in that case, the House adopted and acted on the answers, it was not sitting judicially, but with a view to legislation, which finally proved abortive.”

letter in answer to a letter charging you with forgery?" I yielded to the objection, and refused to allow the question to be put. Notwithstanding some opinions which have been expressed upon the subject, I have never entertained any doubt that the inquiry was inadmissible. The rule of evidence which governs this case, is applicable to all cases where witnesses are sworn to give evidence upon the trial of an issue. That rule is, that the best evidence in the possession or power of the party must be produced. What the best evidence is, must depend upon circumstances. Generally speaking, the original document is the best evidence; but circumstances may arise in which secondary evidence of the contents may be given. In the present case, those circumstances do not exist. For anything that appeared, the defendant's counsel might have had the letter in his hand when he put the question. It was sought to give secondary evidence of the contents of a letter, without in any way accounting for its absence, or showing any attempt made to obtain it. It is enough for us to decide upon the application of the general rule. The best evidence of the contents of the document was not tendered. Much of that which has been urged by Mr. *Macnamara* may be very well founded, and may form cogent argument for a legislative consideration of the subject; but it is in direct conflict with authorities to which we feel ourselves bound to defer. It is said that the question ought to have been allowed, because the answer might have shown the witness to be unworthy of credit. But *The Queen's case* determines that that course cannot be permitted. The argument which has been *942] urged here *to-day seeks to show that the opinion of the judges in that case was erroneous. It seems to me, however, that that reasoning cannot prevail.

MAULE, J.—I also am of opinion that this rule must be discharged. It appears that a witness who had been called and examined on the part of the plaintiff, was asked, on cross-examination by the defendant's counsel, a letter being at the same time shown to him,—“Did you not write that letter in answer to a letter charging you with forgery?” It was objected that the question assumed the existence of a written document which was not in evidence. Undoubtedly, if the question had been answered, it might have been letting in evidence whence the jury might have inferred that the letter spoken of contained certain things, the letter not having been produced, or its non-production accounted for. It is a general rule,—subject, it may be, to an exception in the case of an examination upon the *voire dire*, which is an inquiry of a special nature, in which it is the province of the judge, and not of the jury, to determine whether or not the witness is competent to give evidence,—that, if you want to get at the contents of a written document, the proper way is, to produce it, if you can. That is a rule in which the common sense of mankind concurs. If the paper is in the possession of the party who seeks to have the jury infer something from its contents, he should let them

see it. That is the general and ordinary rule: the contents can only be proved by the writing itself. If the document does not exist, or the party seeking to show its contents cannot get at it, he is at liberty to give secondary evidence, because in that case no better is to be had. An early writer^(a) on the law of evidence states the rule to be, that you shall not give evidence which shows that better is in existence. That seems to me to be a reasonable *way of dealing with the matter. [*943 Here, the very form of the question,—“Did you not write that letter in answer to a letter containing so and so?”—assumes that there is another letter in existence, the production of which would be the best proof of its contents. There was nothing to show why that letter was not forthcoming. Our decision does not, and need not, go further than that. If the letter had been shown to have been lost or destroyed; probably secondary evidence might have been given of its contents. My strong opinion is, that the letter was actually in the hands of the counsel, or of the attorney who sat near him: he evidently was well aware of what its contents were. At any rate, the fair presumption is, that the letter might have been forthcoming. Indeed, the whole argument has proceeded upon that footing. It has been insisted, that, even if the letter had been in court, it could not have been produced. I am at a loss to see why it could not: I know of no rule of law excluding it. Suppose we assume that the paper was shown to the witness, and he is asked, “Did you not say yes, in answer to something contained therein?” can it be contended that the contents of the paper could not be shown? It seems to me, that, if the document was present, the proper way of dealing with it would be to produce it, and then to ask the witness, “Did you not write so and so in answer to it?” This seems to me to be just the sort of case where it is sought to give secondary evidence of the contents of a document in the power of a party who does not choose to produce it. As to testing the memory of the witness, I must confess I have been unable to follow all that has been said upon that subject. General rules of evidence are not to be superseded whenever it may be thought that a witness’s memory may be better tested by violating than by observing them. That is not the way in which general rules, which are adopted because it is *considered to be beneficial generally that they [*944 should be observed, are to be dealt with.

CRESSWELL, J.—I am entirely of the same opinion. With respect to the cases as to evidence given on the *voire dire*, they differ essentially from the present. The decisions upon that subject appear to vary somewhat from the decisions upon evidence before a jury: but this affords no more ground for saying that the latter decisions are wrong, than is the circumstance of the court in banc being in the habit of receiving the testimony of deponents swearing to the best of their information and belief. It is said here that the object of the question objected to,

(a) Gilbert, edit. 1791, p. 4.

was, merely to test the accuracy of the witness's memory, to try his credit. But, shift it as you will, it was a mere attempt to get in evidence of the contents of a written document, without putting in the document itself. The jury were expected and intended to be induced to act upon the inference that the fact existed which that letter was assumed to state. There was nothing to show that the defendant had not the letter in his possession or under his control at the time. If the contents of an absent document may be repeated under pretence of testing the credit or the memory of a witness, it will always be in the power of parties to evade the rule which requires the best evidence to be produced, viz. the instrument itself. The most mischievous consequences would, I conceive, result from such a relaxation of the rule.

WILLIAMS, J.—I concur with the rest of the court, though I must confess it is not without some difficulty that I have brought my mind to this conclusion. I had thought that the rules as to primary evidence were to be relaxed somewhat with respect to the cross-examination of a witness as to facts in themselves foreign to the issues *in the
*945] cause, and going only to his credit. That is in accordance with what is laid down in the 7th edit. of Phillipps on Evidence, and adopted in 2 Russell on Crimes, p. 927,—for which adoption I am in some degree responsible; though I should observe that my contributions to that work, which were made at a very early period of my professional life, were carefully revised (as appears from the preface to the 2d edition) by the learned author; than whom I may venture to say no one possessed more careful and accurate habits of mind, and few had more experience in the practice of the criminal law. That notion was founded mainly upon the existence of the practice of cross-examining a witness, for the purpose of discrediting him, as to his having been convicted of crime, or become bankrupt, or insolvent, and the like. I assumed that it was matter of right, as it certainly was matter of practice, so to cross-examine a witness, without producing any record of conviction, or any proceedings in the bankrupt or insolvent court. I have never known such things to be produced; and I do not see how they could be. I did not conceive that this relaxation was at all inconsistent with the rule laid down by the judges in *The Queen's case*, of the propriety of which I have never entertained a doubt; for, it appears to me that that refers to cases where the examination is with a view to lay a foundation for showing by independent evidence that the witness has made former statements at variance with his present testimony, and not to cases where it goes merely to discredit the witness by his own admission, and where his denial is conclusive. But the cogent observations of my lord and my learned Brothers, in the course of this discussion, have convinced me that I was wrong in supposing that the practice to which I have adverted was matter of right; and I now entertain

serious doubts as to the correctness of my former impression. It is *unnecessary, however, upon the present occasion to determine whether or not that opinion ought to be altogether abandoned, [*946 because I agree with the rest of the court that the particular question which was proposed to be put to the witness in this case, regard being had to its form, and to the object with which it was put, was objectionable, and was properly disallowed. Rule discharged.(a)

(a) The rule upon which this decision purports to be based, is commented upon, and condemned, by the common law commissioners, in their second report, dated April 30, 1853, p. 19.

"The rule," they say, "as laid down by the judges in *The Queen's case* is, that the cross-examining counsel must produce the document as his evidence, and have it read, in order to found any questions to the witness upon it. To prevent any evasion of the rule, the judges further laid it down that counsel could not ask the witness whether he had ever made *representations* of the particular nature suggested to him, without specifying whether the question referred to representations in writing or in words alone. And, so strictly have the judges carried out this principle, that they unanimously adopted and laid down a rule, that a counsel defending a prisoner should not be permitted to ask a witness for the prosecution whether he had not made a different statement before the magistrate, without first reading over and putting in the deposition of the witness.

"The effect of this rule, in practice, is, to exclude the former statement; for, even if a contradiction between the two statements existed, the prisoner's counsel would rarely, if ever, resort to such evidence, as it would give the counsel for the prosecution the reply. Yet the inconvenience of the rule has not unfrequently been felt by the judges, where striking discrepancies between the evidence and the deposition of a witness have been brought to their attention; and more than one learned judge has held that the judges are not bound by the rule, and may, if the justice of the case requires it, look at the depositions while a witness is giving his evidence, and question him as to any discrepancy between them and his evidence as given in court. Mr. Justice PARSONS, however, declined to adopt this practice, saying to the prisoner's counsel, 'I shall not break the law, and you must not.'

"The inconvenience of the rule is fairly illustrated by its working in the instance of the depositions above referred to. Its soundness has been much questioned by able thinkers and authors on the subject of evidence. It is obvious that one of the best tests of the memory or veracity of a witness, *the trial of his recollection or candour as to what he himself has written on the subject on which he has just been deposing, is entirely destroyed by his [*947 being made aware of the existence and contents of the document. Lord BROUGHAM has with much force observed,—'If I wish to put a person's memory to the test, I am not allowed to examine him as to the contents of a letter or other paper which he has written. I must put the document into his hands before I ask him any questions upon it; though, by so doing, he at once becomes acquainted with its contents, and so defeats the object of my inquiry. Neither am I, in like manner, allowed to apply the test to his veracity; and yet, how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him to the contents of a letter written by him, and which he believes to be lost?'

"The chief reason assigned for the rule, is, that the adoption of a contrary course would enable the cross-examining counsel to put the court in possession of only a part of the contents of a paper, though a knowledge of the whole might be essential to a right judgment. The answer, however, is, that, on re-examination, the witness may be asked as to any other parts of the writing which may tend to qualify, contradict, or explain the passages referred to in cross-examination. And, if the objection were a valid one, it would equally hold as to verbal statements forming part of an entire conversation, as to which there is no doubt that a witness may be now cross-examined.

"The judicial decisions to which we have referred, have proceeded rather upon the rule as established, that on its reasonableness,—referring to *Macdonnell v. Evans*. The arguments against the rule as established appear to us to prevail; and we recommend that a witness should be open to cross-examination as to previous written statements he may have made, without the writing being first put in. To such a rule we would, however, annex this limitation, that, if it is intended to contradict the witness by the writing, his attention should, before doing so, be called to those parts which are to be used for that purpose. And we further think, that, in order to prevent any abuse of the facility thus given, it should be competent to the judge, if he deem right, to require the writing to be produced for his inspection, and to be dealt with by him as he thinks fit."

*948] *MASTERS v. LOWTHER. Jan. 30.

Upon a levy of debt and costs under a *fi. fa.*, the officer is not entitled to charge a fee for "search" or "discharge."

Affidavits used upon a motion for an attachment against the sheriff, or his officer, for extortion upon the execution of a *fi. fa.*, are properly intituled in the cause.

FORTESCUE, on a former day in this term, obtained a rule calling upon one Emanuel Jones, an officer of the sheriff of Middlesex, to show cause why an attachment should not issue against him for extortion, in demanding and taking more than the legal fees upon the execution of a writ of *fi. fa.* It appeared from the affidavits upon which the motion was founded, that, on the 2d instant, a writ of *fi. fa.* in this cause was delivered to the sheriff of Middlesex, commanding him to levy of the goods and chattels of the defendant the sum of 19*l.* 14*s.* 6*d.*, with interest, and 1*l.* 1*s.* for the costs of the writ, warrant, &c., together with poundage, officer's fees, &c.; that a levy was made upon the same day by Jones, who thereupon demanded and received for debt and costs and expenses, 24*l.* 17*s.*, which was alleged to be an excess of 2*l.* 0*s.* 11*d.*; and that, on complaint being made to the undersheriff, Emanuel Jones sent to the office of the defendant's attorney 1*l.* 7*s.* 11*d.*, which he admitted to have been overcharged.

Bramwell, before showing cause, objected that the affidavits were improperly intituled in the original cause: he submitted that this was not a proceeding *in the cause*,—which was at an end for all purposes when judgment was signed and execution issued.

Fortescue submitted that this was the usual mode of intituling affidavits in such cases; and he observed (though neither of the reports of the case so states) that the affidavits in *Davies v. Griffiths*, 4 M. & W. 377,† 7 Dowl. P. C. 204, were so intituled.

*949] *PER CURIAM.—This is a proceeding against the officer for misconduct in the cause. We think that is reason enough for intituling the affidavits in the cause.(a)

Bramwell then proceeded to show cause, upon the affidavits (amongst others) of Emanuel Jones and Edward Lewis. Jones's affidavit stated, that, in obedience to the warrant of the sheriff, he, accompanied by Lewis and one Dunning, went to the residence of the defendant for the purpose of making a levy, and there left Lewis to make an inventory of the goods on the premises; that, on the following day, he was informed by Lewis that he had received the amount of the levy and fees, but that, in casting up the figures on a piece of paper, a mistake of 1*l.* had been made; that he immediately told Lewis to return the 1*l.* at once, and afterwards, on complaint being made at the office of the undersheriff, he

(a) In *Simes v. Gibbs*, 6 Dowl. P. C. 310, it was held that affidavits in support of an application against an attorney to compel him to deliver up a document, may be intituled in the action out of which the claim arises, although judgment has been signed and execution issued.

desired Lewis to go there and ascertain the legal amount of charges, and to return the excess, if any; and that he heard no more of the matter until he was served with the rule for an attachment. Lewis, in his affidavit, stated, that, about half an hour after he had been left with Dunning in the house of the defendant, one Shaw asked him for the exact amount of the levy and expenses; that he thereupon told Shaw the various items, which Shaw wrote down on a piece of paper,^(a) and then cast them up, and said they amounted together to 24*l.* 17*s.*, and asked *the deponent if that was right; that the deponent ran his eye [*950 over the paper, but did not detect that Shaw, in casting up the figures, had made a mistake of 1*l.*; that Shaw paid him the amount, whereupon he withdrew Dunning from possession; that, when informed of the mistake, he went to the defendant's house, and offered to return the 1*l.*; and that, ascertaining subsequently at the undersheriff's office that the sum which he ought to have taken was 23*l.* 9*s.* 1*d.*,—viz., levy 19*l.* 14*s.* 6*d.*, writ 1*l.* 1*s.*, interest 1*d.*, levy fee 1*l.* 1*s.*, man in possession 5*s.*, search 3*s.* 6*d.*, discharge 4*s.* 6*d.*, poundage 19*s.* 6*d.*,—the deponent went to the office of the defendant's attorney, and tendered the overcharge, 1*l.* 7*s.* 11*d.*, together with 6*s.* 8*d.*, the attorney's fee, and left the same with a clerk there.

It cannot be denied that an excessive sum was taken, though not to the extent suggested; and the affidavits acquit Jones of blame; he did not receive the money; and, when he discovered the error, he did all he could to rectify it. Besides the error in the casting up, the actual overcharge was only 2*s.* 6*d.* which Lewis inadvertently supposed he was entitled to charge for the warrant in addition to the 1*l.* 1*s.* for executing the writ, and 5*s.* 6*d.* beyond the proper poundage. [JERVIS, C. J.—The officer *must* know that he is only entitled to poundage on the amount of the levy; here he charges it on the expenses also. There is no pretence either for the 3*s.* 6*d.* for search, or the 4*s.* 6*d.* for the discharge; it is taken in direct defiance of the statute.] There is as much reason for taking them on the execution of a *fi. fa.*, as on a *ca. sa.* or on mesne process. [JERVIS, C. J.—In the latter case, the sheriff is bound to let the party out on bail; it is reasonable that he should search, in order that he may know for what amount he is to take bail.] In the scale of

(a) This paper was annexed to the affidavit, and was as follows:—

	£	s.	d.
" Levy	19	14	6
" Writ	1	1	0
" Officer's fee	1	3	6
" Poundage	1	5	0
" Search	0	3	6
" Discharge	0	4	6
" Man in possession	0	5	0
	<hr/>		
	£24	17	0

*951] sheriff's fees, settled by the judges pursuant to the *statute of 7 W. 4 & 1 Vict. c. 55, (a) the bailiff is allowed to take the following fees:—"For searching offices for detainers, 1s.; bailiff's messenger for that purpose, 2s. 6d.; for each man left in possession, when absolutely necessary (if not boarded), 5s. per diem; for any *supersedeas*, writ of error, order *liberati* or discharge to any writ or process, or for the release of any defendant in custody (unless in the prison of the county), or of goods taken in execution, 4s. 6d." [JERVIS, C. J.—That applies only where the goods are released without an actual levy. There has been gross and scandalous extortion.] No doubt: but the question is, whether Jones is to be punished for the misconduct of Lewis. He is not an "offender" within the meaning of the statute. He swears that the thing was done without his knowledge, and that he did not receive any part of the overcharge. [MAULE, J.—Suppose an officer directs his follower to take extortionate fees, the officer would no doubt be *acting* in the extortion. But, if the man, without the concurrence of his superior, takes too much, it would seem hard to hold the latter to be punishable as a quasi criminal. JERVIS, C. J.—If that be so, the offender will always contrive to escape.] The statute speaks of "any sheriff, officer, or *minister* acting in the execution of process directed to any sheriff," &c. The real offender might be attached. [JERVIS, C. J.—"Minister" there means the person who executes the mandates of the county court.]

Fortescue, in support of his rule, submitted that it was perfectly manifest that Jones and Lewis were acting in concert. [He was stopped by the court.]

JERVIS, C. J.—I am of opinion that this rule must be made absolute. *952] The 3d section of the 7 W. 4 & 1 Vict. *c. 55, enacts, "that any sheriff, officer, or minister acting in the execution of process directed to any sheriff, or sheriffs, or engaged or concerned therein, who shall extort, demand, take, accept, or receive from any person or persons any fee or fees, gratuity or reward, not allowed as aforesaid (s. 2), or greater in amount than as allowed as aforesaid, such sheriff or other his officer or minister, upon complaint thereof made against him to any of the several courts of law at Westminster, and on proof being made thereof, upon oath, either by the examination of witnesses *viva voce*, or on affidavits, or on interrogatories, to the satisfaction of the court to which the said complaint shall be made, that such sheriff, officer, or minister, as the case may be, hath offended therein as aforesaid, then and in such case every such sheriff, officer, or minister, as the case may be, shall be adjudged guilty of a contempt of such court, and punished by such court accordingly; and, if any person, not being such officer or minister as aforesaid, shall assume or pretend to act as such, and shall extort, demand, take, accept, or receive any fee or fees, gratuity or

(a) Archb. Pr., 8th edit., by Chitty, Appendix.

reward, under colour or pretext of such office, he shall, on like complaint and proof, be in that respect dealt with by the court in like manner." No doubt, this is a highly penal matter, and the court may proceed against the actual wrongdoer, though not an officer. But I think the circumstances disclosed upon the affidavits sufficiently show, that, throughout the transaction, Jones is identified with Lewis. He has availed himself of an opportunity to take more than the law entitles him to. By his own admission, besides the alleged mistake of 1*l.* in casting up the figures, 2*s.* 6*d.* too much was charged for his own fee, and, in calculating the poundage, he has charged it upon the overcharges, including the poundage itself. That is a strong circumstance to show that Lewis was acting under Jones's instructions. Part of the overcharge, viz. 1*l.* 7*s.* 11*d.*, has been *returned to the defendant's attorney. But that is not the whole of what has been wrongfully [*953 extorted. As to the "man in possession," the table of fees allowed by the judges pursuant to the statute 7 W. 4 & 1 Vict. c. 55, gives 5*s.* *per diem* for that, *when absolutely necessary*. The master informs us that it might have been necessary here to have a man in possession: we, therefore, do not see that that charge is so clearly in excess as to be a violation of the statute, or of the rule of court. But there are two other items which clearly are extortionate. The 3*s.* 6*d.* for "search" is not warranted by the scale: neither is the 4*s.* 6*d.* for the discharge or release of the goods. There was no release of goods here, within the meaning of the rule: that may apply where the goods are released without execution being executed; there being no poundage payable in that case, (a) it may be reasonable that the officer should have something for his trouble. Thus, there is a sum of 8*s.* beyond that returned to the defendant, which is clearly excessive and extortionate. The rule, therefore, will be made absolute for that extortion: it may, however, lie in the office a fortnight. The officer may, on the fifth day of next term, move to discharge the attachment, if the 8*s.* and the costs of this rule are duly paid: otherwise the attachment will go.

The rest of the court concurring, Rule absolute accordingly.

(a) As to where poundage is payable, see Watson's *Office of Sheriff*, 2d edit., 110, 245, and the cases there cited.

***954] *HAMILTON and Others v. JOHN TERRY. Jan. 31.**

Negotiations being pending between the plaintiffs, as mortgagees, and the defendant (who was the son and executor of the mortgagor), relative to the paying off the mortgage, A., one of the mortgagees (acting as their solicitor), on the 7th of December, 1848, wrote to the defendant thus,—“ I fear you will not be prepared to pay off the mortgage, as arranged, on the 1st of January next. If this should be so, I can give further time for payment of the mortgage until the 1st of July next, provided the amount is reduced by the 25th of March next to 1500*l*.” In answer to this, the defendant wrote to A., on the 18th of December,—“ I have well considered what you propose, and, if I could meet it, and thus reduce the mortgage to the sum you mention, it would be the best thing for the estate. I cannot at present raise so large an amount: but I shall be enabled gradually to accomplish what you wish, no doubt: and, if you can give me about a year, it will be most beneficial to me, as well as safer for your client. I can put my hand at this moment upon 100*l*., which I will pay over to you, and will engage by the beginning of April next to have another 100*l*. ready for you, and other sums afterwards, if in the mean time, I should be so unfortunate as neither to be able to transfer the mortgage nor sell the property. If you will allow me as long a time as you can, it will be of very great service to me, and I shall be much indebted to you.”

To this, A., on the 3d of January, 1849, replied,—“ I will consider that 200*l*. will be paid by you on the 1st of April; but I cannot say that further time will be given, unless the amount is made up 1500*l*.; and must therefore ask you to effect this by the time named.”

The 200*l*. was not paid; and, in answer to pressing applications on the part of A., the defendant, on the 9th of April, wrote,—“ I much regret that I was not enabled to pay the 200*l*. into your account by the time agreed upon;” and again, on the 25th,—“ I regret much that I was unable to send you the money by the time you had fixed upon:”—

Held (MAULE, J., *dissentiente*), that the letter of the 18th of December, 1848, and the subsequent correspondence, did not amount to a promise to pay 200*l*., on the 1st of April, in consideration of forbearance until that time, so as to satisfy the statute of frauds; the earlier part of that letter (which MAULE, J., considered to be separable from the rest, and to amount to a distinct and independent promise to pay the 200*l*. on that day, in consideration of such forbearance) forming only part of a proposal for a longer period of forbearance, which proposal was not accepted by A.’s letter of the 3d of January, 1849.

ASSUMPSIT. The declaration contained two counts: the first stated, in substance, a mortgage for 3000*l*. by Stephen Terry, deceased, to the plaintiffs; a default in payment; the death of the mortgagor, leaving the defendant his executor; a sufficiency of assets to pay 200*l*.; that the mortgagor in his lifetime, and the defendant afterwards, remained
 *955] in possession, and in the receipt of the rents and profits of the mortgaged property, by permission of the plaintiffs; that more than 200*l*. remained due upon the mortgage; that the plaintiffs requested payment of the defendant, whereupon it was agreed between the plaintiffs and the defendant that the defendant should pay 200*l*., in part of the mortgage money, on the 1st of April, 1849, and that the plaintiffs should forbear until that day; forbearance of the plaintiffs accordingly; and default of the defendant in payment of the 200*l*.

The second count was for money had and received, money lent, and money found due upon an account stated.

The defendant pleaded,—first, to the whole declaration, non assumpsit,—secondly, to the first count, a denial of the defendant’s possession of the mortgaged property,—thirdly, to the first count, a denial that the defendant promised or engaged with the plaintiffs as alleged,—fourthly, to the first count, a denial that the plaintiffs assented to the

defendant's promises, or entered into the alleged engagement with him ; on all of which pleas issues were joined.

A copy of the pleadings accompanied, and was to be taken as a part of, the case.

The following is a copy of the further and better particulars of demand delivered in the action :—

“ Under the indebitatus count in the declaration herein, the plaintiffs will seek to recover the following items of charge :—

“ For money received by the defendant for and on account £ s. d.
of the plaintiffs about the 24th of August, 1848, from Mr.
Williams, in respect of dilapidations in premises occu-
pied by him in Broad Street, Bath, 150 0 0
*956] * “ Money lent by the plaintiffs to the defendant, . 100 0 0
“ Money had and received by the defendant to the
use of the plaintiffs, 100 0 0
“ Money due from the defendant to the plaintiffs on an ac-
count stated, 100 0 0
“ Money due from the defendant to the plaintiffs on an
account stated, 100 0 0
“ Money due from the defendant to the plaintiffs on an
account stated, 200 0 0

“ Which five last-mentioned items of charge are referred to in the defendant's letters of the 18th of December, 1848, and 9th of April, 1849, wherein the defendant admits them to be due, and promises to pay them.

“ Above is the still further and better account in writing, with dates and items, of the particulars of the demand of the plaintiffs for which this action is brought, pursuant to the order of TALFOURD, J., made on the 4th of January, 1850.”

The cause came on to be tried on the 24th of June, 1850, before JERVIS, C. J., when a verdict was found for the plaintiffs, damages 200*l.*, subject to a special case, upon the argument whereof the court were to have the same powers of amendment as a judge at nisi prius, and the same power to draw inferences of fact as a jury. The jury was, by consent, to be considered as discharged from giving a verdict upon the second issue, which was to be considered as struck out of the record.

On the 8th of September, 1840, the plaintiffs lent Stephen Terry, since deceased, and whose son and executor the defendant is, 3000*l.* upon mortgage. The terms of the mortgage were stated in the first count of the declaration. Default was made in Stephen Terry's lifetime ; and the greater part of the principal remains unpaid.

*Stephen Terry died on or about the 1st of January, 1848, [*957 leaving the defendant his executor.

The following correspondence then took place between the solicitors for the plaintiffs, and Mr. James Lane, one of that firm, and also one of

the plaintiffs, who was the acting mortgagee, on behalf of himself and his co-mortgagees, and the defendant:—

On the 24th of March, 1848, the defendant wrote to the plaintiffs' attorneys as follows:—

“Gentlemen,—I was informed by Mr. Basnett, in a letter from him this morning, that you had applied to him for payment of the interest of the mortgage upon the coach-factory in Broad Street, Bath. I was not aware that it became due before April, or I should have communicated with you before this. May I request that you will let me know by what channel you are accustomed to receive it, as I do not recollect in what manner my late father used to pay it. Mr. Basnett also informs me that the mortgage is to be called in in May. Should you wish it to remain for two or three years longer, I have no doubt we can make the necessary arrangements for that purpose.”

On the 16th of May, 1848, James Lane wrote to the defendant, as follows:—

“Sir,—I have seen my co-trustees, as we agreed when you were here. If 1500*l.* is paid without delay, including the money invested, we will wait until the 1st of July for the balance. But this is really all that can be done: and it is very inconvenient to the parties interested in the mortgage money. I must beg the favour of your reply, stating decidedly what will be done, within a post or two.”

On the 18th of the same month, the defendant wrote to James Lane, as follows:—

*958] “In reply to yours of yesterday, I regret to say that *it will be impossible to raise the sum you mention (1500*l.*) immediately: and the difficulty of getting money just now is so great that I have not yet succeeded in obtaining any promise of a transfer of the security: the premises being at present void, is very much against my doing so. The old tenant is now repairing the dilapidations, which are very numerous and heavy, owing to great neglect on his part; and, as soon as they are completed, I hope to meet with a fresh one; but it was almost useless offering it in the state in which it was left. Was there a possibility of getting anything like the value of the premises by a sale, I should have proposed that course: but, untenanted and dilapidated as they are, I think, in the present state of the money market, it would be most injudicious, especially until the renewal of the life dropped be obtained, the time for which is drawing near. I trust your client will be enabled to make some other arrangements, as I should be very sorry that any disappointment should occur. I am exerting myself to the utmost: but it would be in vain to fix a time for the payment, until the money was actually promised; and equally useless to hold out to you hopes which may not be realized. But I do think, that, if your client will agree to some little postponement, we may be enabled to come to some arrangement.”

On the 29th of June, 1848, James Lane wrote to the defendant, as follows:—

“In reply to your letter of the 27th, I cannot just now tell you the exact amount of stock bought with the surplus; but its value in money is very near 500*l.*, I know. It is very important that the payment on account should be made. Mr. Basnett’s partner promised it last week; and I rely on your paying it (500*l.*), so that I may receive it at my bankers on Monday. You will be good enough to direct your bankers to transmit it to my *account with Messrs. Twining & Co., [*959 bankers, Strand; and I will apply on Monday for it, and send you an acknowledgment. You may rely that I will not call in the residue (the interest and insurance being paid) before the 1st of November.”

On the 1st of July, 1848, the defendant wrote to James Lane, as follows:—

“I have this morning transmitted the 500*l.* through Messrs. Stuckeys’ bank, so that it will be paid into your account at Messrs. Twinings’ on Monday morning; and I shall be obliged by your sending me some acknowledgment of it, as a portion of the mortgage-money. I am obliged to you for delaying the payment of the remaining sum until November; and I trust that before that time we shall be in a position to effect a transfer.

“P. S. Will you have the kindness, when you acknowledge the money, to inform me of the precise time when the interest is due?”

On the 4th of the same month, James Lane answered, as follows:—

“I beg to acknowledge the receipt of 500*l.* through my bankers, Messrs. ‘Twinings’, on account of the mortgage for 3000*l.* from the late Mr. Terry to myself and co-mortgagees, of property in Bath. The interest is due about the 10th of March and 10th of September. I enclose the notice of the insurance premium becoming due on the 7th instant. Pray see it paid in this month.”

On the 23d of August, in the same year, James Lane wrote to the defendant, as follows:—

“I am now able to say that the balance of the mortgage-money will not be required before the middle of January next, by which time I hope it will quite meet your convenience to discharge it. This extension of time *must, however, be subject to my being satisfied [*960 with the state of repair of the premises, and to the life dropped being renewed. I shall be in Cheltenham towards the end of September, and will then see the property. I have not received the receipt of The Legal and General Insurance Office for the July premium on the life of the Rev. Charles Hensley. Be kind enough to send me this.

“P. S. The date when the interest becomes due, is, the 8th of September; and I shall be obliged by your directing it to be paid to my

account with Messrs. Twinings, bankers, here. The amount will be as under,—

“Interest on 3000 <i>l.</i> (less property-tax) half a year . .	72 16 3
“Deduct interest (less tax) on 500 <i>l.</i> paid, from 4th of July to 8th of September	4 6 3
“Amount to be remitted 8th September	£68 10 0”

On the 25th of the same month, the defendant wrote to James Lane, as follows:—

“I have enclosed a receipt for the premium on the life of the Rev. Charles Hensley, which I was not aware had been usually sent to you, or you would have received it some time ago. I am glad to find that your clients can permit the money to remain until January. I trust by that time we shall be fully prepared to pay it. We have had some trouble with the old tenant about the dilapidations: he has done some part; and this morning I have received a sum of money from him in lieu of completing them; so that I hope now to be very shortly in a position to receive a new one.”

On the 7th of December, 1848, James Lane wrote to the defendant, as follows:—

*961] “Not having heard from you, I fear you will not be prepared to pay off the mortgage, as arranged, on the 1st of January next. If this should be so, though I was by no means satisfied with the security when I saw it in September, and presume it is still unlet, I can give further time for payment of the mortgage until the 1st of July next, provided the amount is reduced by the 25th of March next to 1500*l.* With the January dividends, there will be 1050*l.*, or thereabouts, applicable towards the 1500*l.* required: and, if the 1050*l.* is made up to 1500*l.* by the 25th of March, the mortgagees will receive that sum in discharge of so much of the mortgage, the interest upon it thenceforth ceasing. I am desirous, as far as possible, of meeting your convenience, under the circumstances in which you have been placed, and trust you will be able to undertake to make the payment referred to by the 25th of March, as it is only on these terms that I can extend the time beyond the 1st of January.”

On the 18th of December, 1848, the defendant wrote to James Lane, as follows:—

“In answer to your letter of the 9th ultimo [7th instant], I have well considered what you propose; and, if I could meet it, and thus reduce the mortgage to the sum you mention, so as to make it easier to get a transfer of it, *it would be the best thing for the estate.* But I cannot at present raise so large an amount, nor apply the money absolutely necessary for carrying on Bailbrook establishment. But I shall be enabled gradually to accomplish what you wish, no doubt: and, if

you can give me about a year, it will be most beneficial to me, as well as safer for your clients.

“I can put my hand at this moment upon 100*l.*, which I will pay over to you, and will engage by the beginning of April next to have another 100*l.* ready for you, and *other sums afterwards, if in the mean time, I should be so unfortunate as neither to be able [*962 to transfer the mortgage nor sell the property. I have no doubt, that, as soon as the premises are let, I shall be in a situation to effect a transfer of your mortgage, or, failing this, to sell the property, which I would willingly do, and thus release your claim. I am making every exertion to accomplish this. I am at the same time doing all that I can to obtain a tenant. If you will allow me as long a time as you can, it will be of very great service to me, and I shall be much indebted to you.”

On the 3d of January, 1849, James Lane wrote to the defendant, as follows:—

“Referring to your letter of the 18th of December, I will consider that 200*l.* will be paid by you on the 1st of April; but I cannot say that further time will be given, unless the amount is made up 1500*l.*, which would only require about 250*l.* more, and must therefore ask you to effect this by the time named.”

On the 12th of March, 1849, the defendant wrote to James Lane, as follows:—

“I have enclosed a bank-bill for 60*l.* 13*s.* 7*d.*, the amount of the half-year's interest due upon the mortgage on the premises in Broad Street, minus the property-tax of 1*l.* 16*s.* 5*d.*, the receipt of which I shall feel obliged by your acknowledging.”

To this, James Lane, on the 16th of the same month, replied,—

“I beg to acknowledge the receipt of banker's draft, at fourteen days, for 60*l.* 13*s.* 7*d.*, on account of interest on mortgage. I rely on the punctual payment of 200*l.* arranged by us, before the 1st of April next.”

*On the 4th of April, 1849, James Lane wrote to the defend- [*963 ant, as follows:—

“I relied so entirely on your promise to pay 200*l.* before the 1st instant, that I am much disappointed in not having received that amount. I have shown every desire to meet your convenience, without enforcing the many and expensive remedies open to me, and which strictly I ought to have had recourse to: but, unless the remittance is made within a week, I cannot longer continue to forbear.”

On the 9th of the same month, the defendant wrote to James Lane, as follows:—

“I much regret that I was not enabled to pay the 200*l.* into your account by the time agreed upon. I shall, however, be in London during the latter part of this week, or possibly the Monday or Tuesday of

next, when I shall have the pleasure of calling upon you: if possible, it will be this week."

On the 10th of April, 1849, James Lane wrote to the defendant, as follows:—

"Cheltenham, April 10, 1849.

"Your letter of the 9th instant has been forwarded to me here. As I shall not be in London before the end of the week, I shall thank you to pay the 200*l.* to my account at 'Twinings', and I will acknowledge the receipt on my return."

On the 21st of April, 1849, James Lane wrote to the defendant, as follows:

"I am much disappointed at not finding the 200*l.* sent to my bankers'. I cannot wait beyond next week, finally. I must then proceed *in the ordinary way*, though with great reluctance."

*964] *On the 25th of the same month, the defendant wrote to James Lane, as follows:—

"I have to acknowledge the receipt of yours of the 22d ultimo, and to thank you for the kindly spirit in which it was written. *I regret much that I was unable to send you the money by the time you had fixed upon.* But the difficulty of getting it together is very great; especially as for a long time nothing whatever has been coming in from the Broad Street property. I will write again, or see you, at the expiration of this week,—the time you mention."

On the 7th of May, 1849, James Lane wrote to the defendant, as follows:—

"Having waited the expiration of the time mentioned in your two last letters, for payment of the 200*l.*, without avail, I am now obliged finally to say, that, after the present week, I must take all available measures for recovery of the whole amount, *and personally against yourself*, which I regret, but must enforce."

On the 14th of the same month, the defendant wrote to James Lane, as follows:—

"In answer to yours of the 8th ultimo, I regret to say that I find it to be out of my power to pay any more money on account of the Broad Street mortgage, as the property has, as you are aware, been for a long time entirely unproductive, and there is much money owing to other creditors. A bill has been filed, to wind up the estate, by Mr. Kemp, to whom my father was considerably indebted. But I fear it will be found there is little for those creditors who are not secured."

*965] On the 5th of February, 1850, after issue joined, the *plaintiffs' attorneys wrote to the defendant's attorneys the following letter:—

"Hamilton and others v. Terry.

"We abandon the claim of the 150*l.* mentioned in the particulars of

demand as received of Mr. Williams, and undertake not to adduce any evidence in support of that sum."

If the court should be of opinion that the plaintiffs are entitled to succeed in respect of all or any of the causes of action, then the verdict was to stand for the plaintiffs for such amount of damages as the court might direct; if otherwise, the *postea* was to be delivered to the defendant; and, in either event, the court were to direct in what way the several issues should be entered, for the plaintiffs or the defendant.

Willes, for the plaintiffs.(a)—The defendant has by the letters set out bound himself personally, for a good consideration, viz. in consideration of the plaintiffs' forbearance until the 1st of April, to pay them 200*l*. There having been some previous negotiation between the parties relative to the paying off the mortgage, Lane's letter of the 7th of December, 1848, proposes an extension of the period of payment until the 1st of July, 1849, provided *the amount should be reduced [*966 by the 25th of March to 1500*l*. In answer to this, the defendant, on the 18th, writes,—“I cannot at present raise so large an amount: but I shall be enabled gradually to accomplish what you wish; and, if you can give me about a year, it will be most beneficial to me, as well as safer for your clients.” He then goes on,—“I can put my hand, at this moment, upon 100*l*., which I will pay over to you, and will engage by the beginning of next April to have another hundred for you.” And Lane, in his letter of the 3d of January, 1849, referring to the defendant's letter of the 18th of December, says,—“I will consider that 200*l*. will be paid by you on the 1st of April,”—showing an agreement on the plaintiffs' part to forbear until that day. The money not being paid, Lane again writes, on the 4th of April, expressing his disappointment at not having received it; to which the defendant replies on the 9th,—“I much regret that I was not enabled to pay the 200*l*. into your account *by the time agreed upon*. I shall, however, be in London during the latter part of this week, when I shall have the pleasure of calling upon you;” thus adopting the modified proposal in Lane's letter of the 3d. The law applicable to cases of this sort is to be found in *Williams on Executors*, 3d edit., vol. II. pp. 1513—1519.

Channell, Serjt. (with whom was *Montague Smith*), contrà.(b)—The declaration seeks to charge the defendant personally for the debt of

(a) The points marked for argument on the part of the plaintiffs, were,—“1. That the correspondence discloses a contract, on which the defendant is personally liable to pay the sums of money which he has therein agreed to pay to the plaintiffs. 2. That there is a good consideration for this contract, as well in respect of forbearance as of assets more than sufficient to pay the sums in question. 3. That, by promising to pay a part of the testator's debt at a future day, the defendant made that part of the debt his own. 4. That, by promising to pay a part of the debt when the defendant had in his possession sufficient assets to pay it, he became personally liable for its payment.”

The argument took place on the 19th of November, 1851, before JERVIS, C. J., MAULE, J., TALFOURD, J., and WILLIAMS, J.

(b) The points marked for argument on the part of the defendant, were,—

“That the letters set out in the case do not prove the contract alleged in the declaration; that

*967] the testator. It is only in *the event of his having made a promise such as is stated in the declaration, upon the consideration therein alleged, that the defendant can be liable. The question, therefore, is, whether the correspondence set out in the case establishes this. This, it is submitted, shows no forbearance, no consideration. The defendant's letters simply evidence a hope or expectation on his part that he will by a given day be in funds. If they go further, they at the most only show an offer which has not resulted in an agreement: at any rate, they do not show a contract personally to pay upon the day named, upon such a consideration as is necessary to support the promise. The correspondence commences with a letter from the defendant, who seems to have been in ignorance of the state of his testator's liability. The important letters are those of the 7th and 18th of December, 1848. In the former, Lane, addressing the defendant, says,—“I fear you will not be prepared to pay off the mortgage, as arranged, on the 1st of January next. If this should be so, I can give further time for payment of the mortgage until the 1st of July next, *provided the amount is reduced*, by the 25th of March next, to 1500*l.* It is only on these terms that I can extend the time beyond the 1st of January.” In reply to this, the defendant writes,—“I have well considered what you propose. I cannot at present raise so large an amount; but I shall be enabled gradually to accomplish what you wish: and, if you can give me about a year, it will be most beneficial to me, as well as safer for your clients. I can put my hand at this moment upon 100*l.*, which I will pay over to you, and will engage, by the beginning of next April, to have another 100*l.* ready for you, and other sums afterwards.” This was clearly no acceptance of the plaintiff's proposal. On the 3d of January, 1849, Lane again writes,—“Referring to your letter of the 18th of December, I will consider that 200*l.* will be paid *968] *by you on the 1st of April; but I cannot say that further time will be given, unless the amount is made up 1500*l.*, and must therefore ask you to effect this by the time named.” [MAULE, J.—So far as the 200*l.* is concerned, Lane assents to the defendant's proposal; but, as to the rest, he declines to give an extension of time.] The letter of the 3d of January, in terms, reiterates the proposal contained in the letter of the 7th of December. [MAULE, J.—The obvious effect of that letter, as it seems to me, is this,—You offer 200*l.* by the 1st of April. I consent to take that: but, as to the further sums and times, which you leave indefinite, I will give no extension of time, unless you reduce the debt to 1500*l.* by the time named, viz., the 25th of March.] The qualified proposition is nowhere assented to in writing. There was no acquiescence on the defendant's part, to bind the plaintiffs to for-
such letters do not constitute a sufficient agreement in writing to charge the defendant personally with the debt of the testator; and that such letters neither disclose an absolute promise by the defendant to pay personally, as alleged in the declaration, nor a consideration for such promise, if any promise appears.”

bearance. [MAULE, J.—The letter of the 9th of April, 1849, conveys the defendant's regret that he was not enabled to pay the 200*l.* “by the time agreed upon.”] At no period did the plaintiffs bind themselves to forbear until the 1st of April. [MAULE, J.—A man does not usually apologize for neglecting to do a thing which he has not engaged to do.] Assuming that there was a *promise*, it was not made upon the consideration stated in the declaration,—a binding agreement for forbearance on the plaintiffs' part. There is nothing to show that anything occurred to prevent them from suing at any time after the 3d of January, and before the 1st of April. [MAULE, J.—The defendant's terms were too indefinite to be accepted *simpliciter*. He seems by silence to have acquiesced in the letter of the 3d of January.] That will not satisfy the statute. [MAULE, J.—The letter of the 9th of April shows that the defendant himself considered that he had agreed to pay the 200*l.*] That was after the breach: that clearly will not do. [MAULE, J.—Surely there are cases where the signature *has been after the commencement of the action. *Willes* disclaimed [*969 any intention to insist that a completion of the agreement after action brought would do.]

Willes, in reply.—The words of the 4th section of the 29 Car. 2, c. 3, are, that “no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, &c., unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith,” &c. It is not suggested, therefore, that a writing after action brought would satisfy the statute. But it is submitted that any memorandum or note showing, either in itself or by reference to some other document, that an agreement has been entered into upon a good consideration before action brought, will suffice, though made after the commencement of the action. PARKE, B., in *Bill v. Bament*, 9 M. & W. 36,† says: “There must, in order to sustain the action, be a *good contract* in existence at the time of action brought; and, to make it a good contract under the statute, there must be one of the three requisites therein mentioned. I think, therefore, that a written memorandum, or part payment, after action brought, is not sufficient to satisfy the statute.” In *Fricker v. Tomlinson*, 1 M. & G. 772 (E. C. L. R. vol. 39), MAULE, J., referring to *Elliott v. Thomas*, 3 M. & W. 170,† says: “The case in the Exchequer decided that the statute of frauds only altered the evidence of the contract, and did not, like the statute of Anne,(a) make the contract itself void; and, if that be so, a *memorandum of the contract made after action*

(a) 9 Ann. c. 14.

*970] *brought would be sufficient*; and, why, then, should not *an acceptance of goods after action brought be admissible in evidence?" Bill v. Bament has, however, decided that a memorandum after action brought is insufficient. The reason is, that the materials must be complete at the time of action brought. [JERVIS, C. J.—That cannot be the reason: otherwise, the contract could not be stamped after action brought.] In that case, there is a mere prohibition to receive the document in evidence, unless it has a stamp on it at the time. [JERVIS, C. J.—Which of the letters do you rely on as constituting the contract?] The letters of the 18th of December, 1848, and 3d of January, 1849; or the letter of the 3d of January, coupled with the defendant's subsequent acquiescence. [MAULE, J.—The spirit of the statute of frauds is perfectly well satisfied by a contract made after the commencement of the action.] De Beil v. Thompson, 3 Beavan, 469, is a strong instance of a subsequent contract of this sort. There, a parent, by his agent, on the marriage of his daughter, entered into an engagement, in writing, with her intended husband, in which his name was written, but not signed: and it was held, that a letter written by the parent after the marriage, referring to the memorandum as stating the terms of the engagement, was either a sufficient agreement signed by the party, within the statute of frauds, or a sufficient recognition of the use made of his name in the memorandum. And Lord LANGDALE, M. R., in giving judgment, said: "In the case of Randall v. Morgan, 12 Vcs. 73, Sir WILLIAM GRANT expressed great doubt whether a letter after the marriage, referring to a parol agreement before the marriage, would be sufficient to give validity to a promise which of itself produced no obligation: but Lord HARCOURT, in the case of Hodgson v. Hutchinson, 5 Vin. Abr. 522, pl. 34, thought that a letter after marriage, considering the *transactions before, was, in that case, sufficient."

*971] Dobell v. Hutchinson, 3 Ad. & E. 355 (E. C. L. R. vol. 30), 5 N. & M. 251 (E. C. L. R. vol. 36), was a very remarkable case. There, the purchaser of lands by auction signed a memorandum of the contract, endorsed on the particulars of sale, and referring to them: afterwards, he wrote to the vendor, complaining of a defect in the title, referring to the contract expressly, and renouncing it: the vendor wrote and signed several letters, mentioning the property sold, the names of the parties, and some of the conditions of sale, insisting on one of them as curing the defect, and demanding the execution of the contract: and it was held, that these letters might be connected with the particulars and conditions of sale, so as to constitute a memorandum in writing, binding the vendor, under the statute, although neither the original conditions and particulars, nor the memorandum signed by the purchaser, mentioned, or were signed by, the vendor. Lord DENMAN, delivering the judgment of the court, said: "The cases on this subject are not at first sight uniform; but, on examination, it will be found that they esta-

blish this principle, that, where a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them,"—referring more particularly to *Saunderson v. Jackson*, 3 Taunt. 169; *Allen v. Bennett*, 2 B. & P. 238; and *Jackson v. Lowe*, 1 Bingh. 9 (E. C. L. R. vol. 8), 7 J. B. Moore, 219 (E. C. L. R. vol. 17). Here, the defendant's letter of the 18th of December, 1848, offers to pay 200*l.* by a certain time, and expresses a hope that something further will be done. it necessarily involves an expectation of forbearance until the 1st of April. Lane's answer of the 3d of January assents to the first part of the proposal, which is definite, but negatives the hope expressed in the *second part of the defendant's letter. This letter of the 3d of January, coupled with the subsequent conduct of the defend- [*972 ant, clearly amounts to evidence of a contract such as is here declared on. The defendant's silence would, according to the doctrine of *Richardson v. Dunn*, 2 Q. B. 218 (E. C. L. R. vol. 42), 1 Gale & D. 417, be enough for that. [WILLIAMS, J.—When do you assume the contract of which these letters are the evidence to have taken place?] Upon the receipt by the defendant of the letter of the 3d of January. [WILLIAMS, J.—Is the defendant to be bound by his proposal of the 18th of December, if he does not get the whole indulgence which formed his entire scheme?] The letters of the 4th and 9th of April show that there was, before the 1st of April, a contract to pay 200*l.*, in consideration of forbearance until that day. At all events, there was abundant evidence to sustain the account stated. The defendant has had the benefit of the forbearance, and that, according to *Cocking v. Ward*, 1 C. B. 858 (E. C. L. R. vol. 50), forms a sufficient consideration to support the account stated. *Cur. adv. vult.*

JERVIS, C. J., now delivered the opinions of himself, Mr. Justice WILLIAMS, and Mr. Justice TALFOURD:—

The question in this case is, whether there is, upon the correspondence, evidence of the contract stated in the declaration, sufficient to satisfy the statute of frauds.

Upon the argument, I inclined to think that such contract was proved by the letters of the 18th of December, 1848, and of the 3d of January, 1849: but, upon consideration, I agree with my brothers WILLIAMS and TALFOURD in thinking that those letters are not evidence in writing of such contract on the part of the defendant, and that there are no other letters which prove such contract; and that consequently the defendant is entitled to our judgment.

*It is unnecessary to advert to the letters earlier than the 7th of December. Negotiations had been going on, for time to [*973 enable the defendant to pay off the mortgage; and, in that letter, Mr. Lane, one of the plaintiffs, expresses a fear that the defendant will not

It appears to me that the construction put upon these letters by Mr. *Willes*, in his argument, is the true one. The letter of the 18th of December consists of two parts, which are distinct and separable. There is a positive offer to pay 200*l.*, viz. 100*l.* down, and another 100*l.* by the beginning of April; and then the defendant goes on to express an intention to make further payments, and a hope to have further time allowed him,—leaving both indefinite. The judgment which the Lord Chief Justice has just pronounced, proceeds upon the inseparableness of these two portions of the letter. To that I cannot assent. I think the letter imports an absolute proposal to pay 200*l.* by the beginning of April, in consideration of forbearance till then, which proposal is assented to by the plaintiffs' letter of the 3d of January, and so becomes a contract; but that, as to the rest, it was a mere proposal to negotiate.

I am not, however, so obstinately wedded to my opinion, as to think it necessary to multiply expressions of regret at my inability quite to coincide with the view taken by the majority of the court. Upon the whole, the judgment will be for the defendant.

Judgment for the defendant.

*977]

*HEALD v. CAREY. Jan. 14.

To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right.

A. sent by railway from Paris seven cases of pictures, &c., addressed to "A., Custom-House, London Bridge, via Dunkirk, per steamer." Upon their arrival at Dunkirk, one of the packages was found to be damaged, and was, according to the course of proceedings in France, detained there for official examination; the remaining six being sent forward by B., the agent at Dunkirk of the railway company, and also of the steam shipping company, under a bill of lading making them deliverable "to Custom-House, London Bridge, or to order," upon payment of freight. These six cases duly arrived in London, and were received by A.

The remaining case, having been examined and repacked, was forwarded by B. by another vessel belonging to the same company, under a bill of lading making it deliverable "to C., to hold at the disposal of A., Custom-House, London Bridge, or to his order," upon payment of freight. Both bills of lading contained a memorandum stating that the goods were to be taken out twenty-four hours after the steamboat was reported at the Custom-House, or the same would be transhipped into lighters, or warehoused, at the expense and risk of the proprietors of the goods.

Upon the arrival of the vessel in London, the last-mentioned case was landed by C. (who was the agent in London of the shipping company), who paid the duty on the contents, and placed it, in his own name, in a free warehouse on Brewer's Quay, a usual and accustomed and proper place for the purpose.

The wharfinger shortly afterwards, for his own convenience, and without the knowledge of C., removed the case in question, with other goods, to another warehouse of the same description belonging to him, in Seething lane, where it was destroyed by an accidental fire:—

Held, that C. did not exceed his duty, in landing and warehousing the goods, and consequently was not guilty of a conversion, or responsible for their loss, although the jury found that he was not acting with a view to do his best, or as a prudent man would have acted intending to do his best, for the benefit of the owner of the goods, but with a view to his own profit, and that the circumstance of his having paid the duty upon the goods made no difference.

THIS was an action of trover for a case containing pictures, frames, &c.

Plea,—first, not guilty,—secondly, not possessed.

The cause was tried before WILLIAMS, J., at the sittings at Westminster after Trinity Term last. The facts which appeared in evidence were as follows:—

On the 8th of August, 1850, the plaintiff, who was then residing at Paris, being desirous of sending certain pictures (which he had carried over with him from England about four months before) and bronzes to England, caused them to be packed in seven cases, which were marked and numbered DD 1 to 7, and addressed **“Nisbett, Custom- [*978* House, London Bridge, per Steamer,” and sent to the station of the Railroad of the North, where his butler George Nisbett on his behalf signed the following “customs declaration:”—(u)

“Railroad of the North. First division.

“Office of *Paris*. Exploitation.

“(Date.) Declaration of Customs. Page of route, No. —.

“I the undersigned, *George Nisbett*, residing at *Paris, rue Beaugon*, 3, declare to dispatch by the railroad of the North the goods described below, to the address of *Custom-House, London Bridge*, at *London*, I engaging to pay all the expenses of carriage and other charges to which the cases described below may be subjected, weighing together,—

Marks.	Nos.	Number.	Nature of the cases.	Weight.	Value.
DD	1	1	<i>Case containing 11 pictures under canvas</i>	138 kil.	900 fr.
DD	2	1	<i>Case containing gilt bronze 2, 2 vases, 1 clock, and several small objects in bronze and porcelain</i>	96 “	3000 “
DD	3	1	<i>Case, 10 pieces bronze, 3 clocks</i>	170 “	1500 “
DD	4	1	<i>Case, 5 large pieces bronze (gilt) and clocks, and a quantity of small pieces gold, bronze, &c.</i>	203 “	2000 “
DD	5	1	<i>Case, 10 pictures on canvas and under glasses</i>	95 “	1200 “
DD	6	1	<i>Case, 7 pieces of porcelain, 2 complete vases</i>	62 “	2500 “
DD	7	1	<i>Case, differs: horse harness for a carriage</i>	135 “	500 “
				899 “	11600 “

(Signed) “*George Nisbett*”

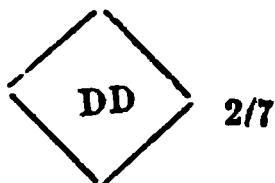
Upon the arrival of the seven cases at Dunkirk, it was found that one of them, DD No. 1, had sustained damage during its transit; and accordingly it was detained there, pursuant to a regulation of the French law, by one Richard, who was the agent there, as well of the railway *as of The General Screw Steam Shipping Company, for the pur- [*979 pose of its undergoing an official inspection by an officer of The Tribunal de Commerce. The other six cases were forwarded to London by the last-mentioned company’s vessel Sir Robert Peel, under a bill

(u) The parts in *italic* were written ; the rest printed.

of lading of which the following is a copy,—the parts in italic being written, the rest printed:—

“General Screw Steam Shipping Company’s agency.

N. Richard,
Commercial agent,
Dunkirk.



“Disbursements £—sterling.
“The goods to be taken out 24 hours after the steam-boat is reported at the Custom-House, or the same will be transhipped into lighters, or warehoused, at the expense and risk of the proprietors of such goods.”

“Shipped in good order and well-conditioned, by N. Richard, in the steam-boat of the English company General Screw Steam Shipping Company, named the *Sir Robert Peel*, commanded, for the present voyage, by Captain *John Boxer*, and now moored in this harbour, bound for London, *six cases pictures, bronzes, clocks, and harness of horses, weighing about 761 kilogrammes*, the said goods marked and numbered as in the margin, and to be delivered in the like good order and condition at the said port of London (the act of God, the Queen’s enemies, fire, machinery, boilers, and all and every other dangers and accidents of the seas, rivers, and steam-navigation of whatever nature or kind soever excepted) to *Custom-House, London Bridge*, or to order, upon payment of freight at the rate of *3l. 11s. sterling from Paris to London*, with — per cent. *primage, and average accustomed, and disbursements as in the margin, amounting to —.*

“In testimony whereof the captain or agent of the said ship has signed *three bills of lading all of this tenor and even date*, the one of which being performed the others shall be void.

“Done at Dunkirk, *the 10th August, 1850.*

“*Pr. N. Richard,*

“*Moissenet.*

“Contents, weight, and measure unknown.”

The endorsement was as follows:—“Deliver to my order, George Frederick Nisbett, 16, Suffolk Street, Pall Mall.”

*980] On the 11th of August, Richard, the agent at Dunkirk, *wrote to the defendant, who was a custom-house agent in London, and also agent for the shipping company, as follows:—

“Dunkirk, 11th August, 1850.

“Mr. W. H. CAREY, London,

“Sir,—Time failed me yesterday to write to you. I am now to repair this involuntary omission; and I hope this letter will reach you before the discharging of the *Sir Robert Peel*. This vessel sailed with a cargo rather insignificant, but better than I at first expected.

“In the packet addressed to you, forwarded by my house, you found the bill of lading for DD 2|7, six cases, containing pictures, bronzes, clocks, &c. These cases, sent from Paris by Mr. George Nisbett, are addressed Custom-House, London Bridge. Have the goodness to hand the bill of lading to the party entitled, apprising him at the same time that the case DD No. 1, arrived here with internal breakages, and that I was bound to demand from the tribunal an inspection, for ascertaining the cause and the extent of the damage. This inspection having been finished, it appears that the damage was caused by bad packing. As soon as the orders of Mr. Nisbett are received, I will forward you the case remaining in dock.

(Signed) “For N. RICHARD,

“MOISSENET.”

The damaged case having been inspected by the proper officer at Dunkirk, Richard paid the charges and customs duty thereon, and on the

13th of August, shipped it on board the City of Rotterdam steamer for London, under a bill of lading making it deliverable “to Mr. Carey, to hold at the disposal of Mr. George Nisbett, Custom-House, London Bridge, or to his order, upon payment of freight at the rate of 2*l.* 12*s.* 11*d.* sterling from Paris to London.”

*This bill of lading was enclosed in a letter of the same date addressed by Richard’s clerk to the defendant, to the following [*981 effect:—

“Dunkirk, 13th August, 1850.

“Mr. W. H. CAREY, London.

Sir,—I have the honour to remit to you under this cover the bill of lading of DD No. 1, one case of pictures, which please to hold at the disposal of Mr. George Nisbett, Custom-House, London Bridge.

“For N. RICHARD,
“MOISSENET.”

“P. S. On the other side, I give you my detailed account of the case DD No. 1, for which an inspection has been demanded. These charges amount to the sum of fr. 46.65; and, if Mr. Nisbett desires it, to preserve his recourse against the sender or the packer, I will send him the document, signed by the members of the tribunal.

“Customs duties 900 fr., $\frac{1}{4}$ per cent. 10c. stamp and receipt	3.30
“Dunkirk to London	16.15
“Charges of inspection, unpacking, and repacking	46.65

“fr. 66.10

“£2. 12. 11.”

Nisbett duly received the six cases numbered 2 to 7, which were cleared for him by one Nelham, a custom-house agent, who had been recommended to him for that purpose by the defendant. The case numbered 1, arrived in London on the 15th of August; but, no person being there on the part of the plaintiff to receive it within twenty-four hours after the ship was reported, the defendant, without any instructions, and without making any communication to the plaintiff or to any person on his behalf, cleared it, and caused it to be placed, on the 16th, in his own name, *in the warehouse of one Barber, on Brewer’s Quay (part of which was bonded and part free), where he was [*982 accustomed to deposit goods arriving by steam-vessels from Dunkirk, and paid the duty upon the contents. The case was afterwards, viz. on the 13th of September, removed by Barber, for his own convenience, and without any direction from, and without the knowledge of, the defendant, to another warehouse belonging to him, in Seething Lane, where it was destroyed by an accidental fire on the 19th. The demand was subsequent to the fire.

On the part of the plaintiff, it was contended that the duty of the defendant, upon the arrival of the package in question in London, was, either to send information thereof to Mr. Nelham, the agent who had cleared the other six packages, or to allow the case to be conveyed to the Queen's warehouse (referring to the customs regulation act, 8 & 9 Vict. c. 86, s. 16): and it was insinuated that the defendant's object in doing as he did, was to obtain the commission or brokerage for landing, clearing, and warehousing the package himself.

For the defendant, it was insisted that there was no evidence of a conversion,—citing *Fouldes v. Willoughby*, 8 M. & W. 540,† 1 Dowl. N. S. 86, where it was held, that, to maintain trover, there must be some exercise of ownership over the chattel taken, inconsistent with the owner's right of dominion. But, the learned judge intimating an opinion that there was a case for the jury that the destruction of the goods was the result of an unauthorized act of the defendant, it was submitted, that the evidence showed that the defendant had authority to do as he did with the goods; that, the package in question arriving with the loose direction it did, consigned to the defendant's care, the *983] defendant could not reasonably have dealt with *it otherwise than he did; and that, at all events, he was not responsible for the act of Barber in removing the case from the warehouse at Brewer's Quay to that in Seething Lane, but for which removal it would have been safe, and consequently the plaintiff was not entitled to recover, as against the defendant, more than nominal damages.

The learned judge left it to the jury to say,—first, whether the plaintiff had authorized the defendant to act as he did in depositing the goods in Barber's warehouse,—secondly, whether the defendant's object, in doing as he did, was, to do the best he could for the benefit of the consignee,—thirdly, whether he acted under the circumstances as a prudent man would have acted, whose object was to do the best for the benefit of the owner of the goods. And, as to the damages, he observed that there could be no such thing as nominal damages in trover, unless the goods were restored; and he left it to the jury to say what was the value of the pictures at the time they were landed, regard being had to what had occurred to the package in the course of its transit by railway.

The jury having answered these three questions in the negative,(a) and assessed the value of the pictures at 150*l.*, his lordship thereupon directed a verdict to be entered for the plaintiff for 150*l.*,—reserving to the defendant leave to move to enter a verdict for him, or a nonsuit, if the court should be of opinion that there was no evidence of a conversion; or to reduce the verdict, if the court should be of opinion that

(a) One of them at the same time observing, "We think that the defendant had no right to meddle with the package. If he had taken no notice of it whatever, it would have gone to the Queen's warehouse, and been delivered up to the plaintiff when he or his agent applied for it."

there *was* evidence of a conversion, but that the plaintiff was not entitled to more than nominal damages.

* *Watson*, in Michaelmas Term last, moved accordingly, and also for a new trial on the ground that the verdict was against [*984 the weight of evidence. He submitted that the evidence disclosed no conversion; that the defendant performed his duty when he placed the goods, no one having claimed them on the part of the owner within twenty-four hours after the ship was reported, in a place of safe custody; and that the circumstance of the defendant's having paid the duty upon them made no difference, inasmuch as if the money was improperly paid, it was merely a payment by the defendant in his own wrong, with which he could not charge the plaintiff. He cited *Bushel v. Miller*, 1 Stra. 128, *Drake v. Shorter*, 4 Esp. N. P. C. 165, *Alexander v. Southey*, 5 B. & Ald. 247 (E. C. L. R. vol. 7), and *Fouldes v. Willoughby*, 8 M. & W. 540,† 1 Dowl. N. S. 86. [MAULE, J., referred to *Stiernheld v. Holden*, 4 B. & C. 5 (E. C. L. R. vol. 10), 6 D. & R. 17 (E. C. L. R. vol. 16), R. & M. 219 (E. C. L. R. vol. 21), and asked,—Did not the defendant, by paying the duty, acquire to himself a larger control over the goods than he would otherwise have had? And did he not pay the duty for the purpose of acquiring such larger control?]

Byles, Serjt., and *G. R. Clarke*, now showed cause.—There was ample evidence of a conversion. By the defendant's unauthorized dealing with the goods, they have been destroyed. He had no right to subject them to a lien, by paying the duty upon them, and lodging them as he did in a free warehouse. But for that unauthorized act, they would have been safely housed in the Queen's warehouse, under the customs regulation act, 8 & 9 Vict. c. 86, s. 16, which provides for the very case. It enacts "that every importer of goods shall, within fourteen days after the arrival of the ship importing the same, make perfect entry inwards of such goods *or entry by bill of sight, in manner thereafter [*985 provided, and shall within such time land the same; and, in default of such entry and landing, it shall be lawful for the officers of the customs to convey such goods to the Queen's warehouse; and whenever the cargo of a ship shall have been discharged, with the exception only of a small quantity of goods, it shall be lawful for the officers of the customs to convey such remaining goods, and at any time to convey any small packages or parcels of goods, to the Queen's warehouse, although such fourteen days shall not have expired, there to be kept waiting the due entry thereof during the remainder of such fourteen days; and, if the duties due upon any goods so conveyed to the Queen's warehouse shall not be paid within three months after such fourteen days shall have expired, together with all charges of the removal and warehouse rent, the same shall be sold, and the produce thereof shall be applied, first, to the payment of freight and charges, next, of duties, and the overplus (if any) shall be paid to the proprietor of the goods."

The question which arose in *Fouldes v. Willoughby*, arises here [MAULE, J.—Could the defendant have brought an action against the plaintiff for the money he paid, as for so much money paid to the plaintiff's use?] Clearly not. The jury find that he had no authority to make the payment, that he had some indirect motive for what he did, and that he did not act as a prudent man intending *bonâ fide* to do the best for the consignee, would have done. The goods having been destroyed by the means and in consequence of the defendant's unauthorized act, that, according to the doctrine laid down in *Fouldes v. Willoughby*, amounts to a conversion. Lord ABINGER there says: (a) "In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, *owing to his act, the
*986] goods are destroyed or consumed, to the prejudice of the lawful owner." [MAULE, J.—Suppose a horse being near a ferry, and the ferryman, imagining (contrary to the fact) that the owner of the horse wanted it ferried over, takes it on board, and the horse is accidentally drowned on the passage,—would that be a conversion?] It is submitted that it would. [CRESSWELL, J.—At what period?] At the moment when the ferryman took the horse into his unauthorized custody, and so put it in the way of being drowned. Here, the bill of lading gave no property to the defendant in the goods: he was "to hold them at the disposal of Nisbett:" *Evans v. Martell*, 12 Mod. 156, 3 Salk. 290, 1 Lord Raym. 271. In *Syeds v. Haigh*, 4 T. R. 260, BULLER, J., says: "If one man who is intrusted with the goods of another put them into the hands of a third person, contrary to orders, it is a conversion. If a person take my horse to ride, and leave him at an inn, that is a conversion; for, though I may have the horse, on sending for him and paying for the keeping of him, yet it brings a charge on me." [JERVIS, C. J.—The goods in question having been originally carried from this country to Paris, how came they to be chargeable with duty at all? (b)] In *Hawkes v. Dunn*, 1 C. & J. 519,† the defendant received from A. some bacon, really the property of a bankrupt, and the messenger under the commission asked him if he had not got some bacon of the bankrupt; to which he replied that he had some belonging to A.; upon which the messenger desired him to take care of it, and not
*987] part with it, as more would *be heard of it: the defendant afterwards allowed the bacon to be returned by A. to the person from whom A. received it: and it was held that this was evidence of a conversion. [WILLIAMS, J.—In that case, the defendant, after a sort of

(a) 8 M. & W. 547.†

(b) The 33d and 34th sections of the 8 & 9 Vict. c. 86, provide that goods exported may be legally re-imported and entered by "bill of store," and warehoused as upon the first importation, "provided the property in such goods continue in the person by whom or on whose account the same have been exported, and that such re-importation take place within six years from the date of the exportation." Here, it was within four months.

acquiescence in the claim of the messenger, allowed the bacon to get into the hands of a person having no title. This is not this case.] *Powell v. Saddler*, cited, *Paley's Pr. & Agent*, 3d edit. 80 (e), was a case of trover for three horses. The plaintiff had sent the horses to the defendant, to be sold the next day: the defendant's clerk told him that the next day would not be so good a time to sell them as the following sale-day; in consequence of which, the plaintiff said he would send for them back again, which he did the next evening; but they had been sold. In a conversation concerning the sale, the defendant said it was "a mistake of his clerk, for which he was not answerable." *Garrow*, for the defendant, insisted that there was no evidence of conversion. But Lord ELLENBOROUGH said: "I am of opinion that a conversion has been proved: the horses were intrusted to the defendant for a qualified purpose, which he admitted was not conformed to. Where goods are committed to one for a qualified purpose, any deviation from it in the disposition of them is a conversion; as, if a man borrow a horse to ride, and leave him at an inn, it has been held to be a conversion." [JERVIS, C. J.—No doubt, a man may be guilty of a conversion of goods which have rightfully come into his possession, if he uses them for a purpose other than that for which they were intrusted to him. But, does the mere fact of the defendant's having as a volunteer paid the duty charged upon these goods, constitute a conversion?] It is submitted that it does, inasmuch as it changed the destination of the goods, and so caused their destruction.

Then, it is said, that, assuming that there was a conversion, it took place when the goods were warehoused *at Brewer's Quay; and that the defendant, being no party to their removal to Seething Lane, is only liable for nominal damages. It is submitted, however, that the true measure of damages, is, the value of the goods, and that the only result of the fire, was, to deprive the defendant of the option of delivering them up. [JERVIS, C. J.—The verdict and judgment in trover changes the property in the goods.(a)] The delivery up of the goods is mere matter of arrangement. Lord ELLENBOROUGH, in *Mercer v. Jones*, 3 Campb. 477, says,—“In trover, the rule is, that the plaintiff is entitled to damages equal to the value of the article converted, at the time of the conversion.” So, in *M'Leod v. M'Ghie*, 2 Scott, N. R. 604, 2 M. & G. 326 (E. C. L. R. vol. 40), in trover for an unstamped memorandum, whereby the defendant agreed to guaranty to the plaintiff payment for “half the amount of certain fixtures, say about 100*l*.” (which memorandum the defendant withheld from the plaintiff, having obliterated his own signature), the jury gave an unqualified verdict for 100*l*.; and a motion for a new trial, on the ground that the memorandum, being unstamped, was worthless, and therefore the damages excessive, and that the judge ought to have directed the jury to find a verdict

(a) See *Cooper v. Shepherd*, 3 C. B. 266 (E. C. L. R. vol 54).

in the alternative,—to be reduced to nominal damages, on the memorandum being given up,—was refused. And in *Finch v. Blount*, 7 C. & P. 478 (E. C. L. R. vol. 32), the defendant in trover having only pleaded that he did not convert the goods, PATTESON, J., refused to allow his counsel to cross-examine the plaintiff's witnesses, to show, in mitigation of damages, that the goods taken really belonged to a third person; saying,—“I really think, that, in trover, the verdict that the jury are forced to give, is, the value of the property. There have been cases in trover where it has been attempted to get more damages than the property sold for: (a) but I never heard, that, *where property is *989] taken, the plaintiff is to have a farthing damages, and the defendant keep the property: that would be allowing the defendant to take advantage of his own wrong. I think I ought not to admit the evidence.”

Watson (*Bramwell* and *Manisty* were with him) was heard in support of the rule.—The defendant was, notwithstanding the answers given by the jury to the questions put to them by the learned judge, perfectly justified in dealing as he did with these goods. And, even if he were not, that which he did does not in law amount to a conversion. The goods in question were sent by the plaintiff, to go by railway from Paris to Dunkirk, from which latter place they were to be forwarded by steamboat to London Bridge. They were accordingly put on board a vessel at Dunkirk, and transmitted to London under a bill of lading making them deliverable to the defendant, “to hold at the disposal of Mr. George Nisbett, Custom-House, London Bridge, or to his order (that is, the order of the defendant), upon payment of freight at the rate of 2*l.* 12*s.* 11*d.* from Paris to London.” The defendant was the agent of the shipping company, and also in some sense the agent of the plaintiff. The goods, therefore, came rightfully into his possession; and it was his duty to take reasonable and proper care of them. He would not have been justified in leaving them derelict, as it is suggested he should have done, for the custom-house officers to do as they pleased with them. Being bound to land them, he was bound to take care of them when landed. Accordingly, he warehoused them (having first paid the duty upon them) in a proper and convenient and accustomed place. Having discharged his duty with respect to the goods, he clearly cannot be liable for a misfortune which afterwards happened to them through no fault, no agency of his. Assuming that he was not *990] bound to pay the duty, or even that he was not justified *in doing so, it is impossible that that can make an act tortious which otherwise was not tortious. [He was proceeding to observe upon the cases cited on the other side, when he was stopped by the court.]

JERVIS, C. J.—I am of opinion that this rule should be made abso-

(a) See *Davis v. Oswell*, 7 C. & P. 804 (E. C. L. R. vol. 32).

lute to enter a nonsuit. The question is, whether, upon the evidence, the defendant was shown to have been guilty of a conversion. It is admitted that that is purely a question of law. The facts were these:—The plaintiff, who had been residing for a short time at Paris, consigned thence by railway to Dunkirk, for the purpose of being forwarded by a steam-vessel to London, seven cases of pictures and other articles of value. Upon their arrival at Dunkirk, it was found that the contents of one of the seven packages had sustained damage on the transit, and therefore that package was detained there for examination by the proper officers, and the remaining six sent on to London by a vessel belonging to the “General Screw Steam Shipping Company,” whose agent the defendant was, under a bill of lading making them deliverable to “Custom-House, London Bridge, or to order,” upon payment of the freight from Paris to London. The damaged package having been inspected, and the goods repacked, it was a few days afterwards forwarded by one Richard, the agent at Dunkirk of the railway company and also of the shipping company, on board another of their vessels, under a bill of lading making it deliverable to “Mr. Carey (the defendant) to hold at the disposal of Mr. George Nisbett, Custom-House, London Bridge, or to his order,” upon payment of freight. The bill of lading contained a memorandum in the margin, as follows:—“The goods to be taken out twenty-four hours after the steamboat is reported at the Custom-House, or the same will be transhipped into lighters, or warehoused, at the expense and risk of the *proprietors of such goods.” It was contended, first, that [*991 Richard had no authority to consign the package in question to the defendant in the manner he did. But, whether or not, the defendant received it as the nominal consignee: if Richard, acting to the best of his judgment as agent of the company, consigned the goods to the defendant on account of the plaintiff, although Richard might have been acting without authority, this would be no conversion by the defendant. The bill of lading gave the defendant authority to unload the goods; and he was bound to unload them within the time limited by the bill of lading. Then it is said that the defendant ought to have left the goods on board, in which case they would have been taken possession of by the officers of the customs, and conveyed to the Queen’s warehouse, whence the plaintiff might have had them at any time within three months. I do not accede to that. It is further insisted that the defendant should, at all events, have made what is called an imperfect entry of the goods, (a) *and so have caused them to be placed in [*992 a bonded warehouse, instead of paying the duty. But it seems

(a) The 18th section of the 8 & 9 Vict. c. 86, requires a bill of entry, which is to contain the quantity and description of the goods.

The 24th section enacts, “that, if the importer of the goods, or his agent, after full conference with him, shall declare before the collector or comptroller that he cannot, for want of full information, make a full or perfect entry of such goods, and shall make and subscribe a declaration

to me, that even if he ought to have taken that course, yet, acting as he was bound to act for the benefit of the owner, the mere fact of the payment of the duty, though unauthorized, would not make him guilty of a conversion. It was his duty, as consignee, to clear the goods, and to hold them for the plaintiff; and he discharged that duty, even though he paid the duty on the goods in his own wrong. He was guilty of no negligence. The goods were destroyed by an accidental fire, for which neither the defendant nor the shipping company was liable. Three points were put to the jury. The first was, whether the defendant was authorized in point of fact to deal with the goods as he did. The jury found that he was not. But, if the goods were consigned to the defendant, whether he was or was not authorized to pay the duty upon them, he was at all events justified in depositing them in a place of safe custody, and their destruction there without his default cannot make him guilty of a conversion. The jury further found that the defendant's object was not to do the best he could for the consignee, but that he was actuated by some indirect and sinister motive; and, further, that *993] he did not act as a prudent man intending to do *the best for the consignee would have acted. Assuming that to be so, if he was justified, as I think he was, in clearing the goods, and if he acted legally, though his motives might have been improper, no cause of action accrues to the plaintiff. A man's motives will not make wrongful an act which in itself is not wrongful. I think the defendant was perfectly justified in what he did: he claimed no property in the goods: and their destruction was not the consequence of any negligence or wrongful act on his part.

MAULE, J.—I also am of opinion that the plaintiff ought to be nonsuited. It appears to me that the fair result of the evidence is, that the goods were destroyed by an accidental fire, under circumstances which leave the owner to bear the loss. It is not necessary to decide

to the truth thereof, it shall be lawful for the collector and comptroller to receive an entry by bill of sight for packages or parcels of such goods, by the best description which can be given, and to grant a warrant thereupon, in order that the same may be provisionally landed, and may be seen and examined by such importer in presence of the proper officers; and, within three days after any goods shall have been so landed, the importer shall make a full or perfect entry thereof, and shall either pay down all the duties which shall be due and payable upon such goods, or shall duly warehouse the same, according to the purport of the full or perfect entry or entries so made for such goods, or for the several parts or sorts thereof: Provided always, that, if, when full or perfect entry be at any time made for any goods provisionally landed as aforesaid by bill of sight, such entry shall not be made in manner herein required for the due landing of the goods, such goods shall be deemed to be goods landed without due entry thereof, and shall be subject to the like forfeiture accordingly."

And the 25th section enacts, "that, in default of perfect entry within such three days, such goods shall be taken to the Queen's warehouse by the officers of the customs; and, if the importer shall not within one month after such landing make perfect entry or entries of such goods, and pay the duties thereon, or on such parts as can be entered for home use, together with the charges of removal and of warehouse-rent, such goods shall be sold for the payment of such duties (or for exportation, if they be such as cannot be entered for home use, or shall not be worth the duties and charges), and for the payment of such charges and the overplus, if any, shall be paid to the importer or proprietor thereof."

that absolutely, because the only question is, whether or not the defendant was guilty of a conversion. There is no doubt that a negligent dealing by a bailee with goods is not a conversion; and there is equally no doubt that a bailee is not liable for a conversion arising out of a negligent dealing with the goods by him, but which is not an act participated in by him. He may be liable to an action of another description, but not to an action of trover, which only lies where some dominion is asserted by the defendant over the chattel which is the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is to a certain extent guilty of a conversion. But where, as is the case here, there is no unlawful taking of possession, or assertion of dominion over the goods, although the goods may be destroyed, there is no conversion, unless the bailee is a participator in the act which causes their destruction. Here, the goods found their way into the hands of the defendant under a direction that they should be held by him for Nisbett. He had something to do [*994] with respect to them: he was not to conduct himself altogether as a stranger to the matter. He paid the duty on the goods. It may be that he has incurred a charge which he could not recover from the plaintiff: but the loss of his money is the only penalty. He lands the goods and places them in a fit place of custody; and they are there burnt. I do not see any evidence of negligence; and certainly none of a wrongful conversion. I think the verdict upon not guilty should have been for the defendant. It is true that the jury have found that the defendant, in acting as he did, did not intend to do what was best for his employer. But, as it appears upon the evidence that he did nothing but what he might legally and properly do, he is not liable in this action. He has done nothing which can amount to a conversion. I therefore concur with my Lord in thinking that the rule should be made absolute to enter a nonsuit.

CRESSWELL, J.—I also think it is very plain that the plaintiff in this case is not entitled to recover: and I think we must have arrived at the same result, whether the action were brought against the defendant as identified with the company, or as an individual. It would be singular indeed if anything which occurred at Dunkirk could constitute a conversion. When the case in question arrived in London, it came consigned to the defendant, to hold at the disposal of Nisbett, who represents the plaintiff. The defendant received it for that purpose. How can it be said, that, in so doing, he converted it to his own use? He never repudiated the plaintiff's right, or took any course with regard to the goods which was at all inconsistent with his duty. It was his duty to receive and to take care of them. But it is suggested that he put them into an inconvenient place. The place, however, seems to have been a usual and proper one, where the owner could have got them

*995] *at any time. There was no conversion in that; no exercise of dominion over the goods by the defendant, except as the agent of the real owner. Then it is said he exceeded his authority in paying duty upon the goods. He paid a sum of money, in order that he might be able to place the goods in a free instead of a bonded warehouse. It may be that he has unnecessarily incurred that expense: but that would not make conduct otherwise regular amount to a conversion. The defendant was still acting as the agent of the plaintiff, and in the due performance of his duty. There clearly has been no conversion.

WILLIAMS, J.—I am of the same opinion. Richard, who was the agent of the General Screw Steam Shipping Company at Dunkirk, having received the package in question for the purpose of forwarding it to its destination, consigned it to the defendant, to hold at the disposal of Nisbett, that is, for the use of the plaintiff. Upon its arrival in London, the defendant, in the strict performance of his duty, landed the package, and, having first paid the duty upon it, placed it in a usual and proper place of safe custody. I think, in so doing, he did nothing which in law amounts to a conversion: nor is he liable for the subsequent destruction of the goods at the place to which the wharfinger without his sanction or knowledge removed them. This view is quite consistent with the finding of the jury upon the three points which I left to them. They thought the defendant was influenced by a hope of profit. Whatever his motive, he did nothing which in law amounts to a conversion.

Rule absolute for a nonsuit.

Any use or disposition of a chattel without the consent of the owner and inconsistent with his rights is a conversion: *Hutchinson v. Babo*, 1 Bailey, 546; *Reid v. Colcock*, 1 Nott & M'Cord, 592; *Bristol v. Burt*, 7 Johns. 254; *Murray v. Burling*, 10 Ib. 172; *Reynolds v. Shuler*, 5 Cowen, 323; *Repley v. Dolbien*, 6 Shepley, 382; *Glase v. M'Million*, 7 Porter,

279; *St. John v. O'Connell*, Ibid. 466; *Hyde v. Noble*, 13 New Hamp. 494; *Liptrot v. Holmes*, 1 Kelly, 381; *Powell v. Olds*, 9 Alabama, 861; *Sanderson v. Haverstick*, 8 Barr, 294; *Crocket v. Beaty*, 8 Humphrey, 20; *Harris v. Saunders*, 2 Strobhart Eq. 370; *Dickey v. The Franklin Bank*, 32 Maine, 572.

*996]

*NICOLL v. CHAMBERS. Jan. 23.

A contract of sale by auction described the property as "the freehold cottage and copyhold paddock, comprising 1a. 2r. 8p., situate, &c., described in the particulars attached hereto as lot 1." In the annexed particulars, lot 1 was thus described:—"The property is freehold (with the exception of the paddock, which is copyhold), and comprises 1a. 2r. 8p., situated, &c. The premises consist of a double cottage, &c., and paddock, in the occupation of Mr. P." The contract contained the usual clause, that the title and conveyance should be completed according to the conditions of sale. The sixth condition was as follows:—"The several properties comprised in the foregoing particulars, are presumed to be correctly described; and the quantities of the land shall be taken as stated, whether more or less (although the title-deeds and court rolls state such quantities to be less), without any equivalent or compensation on either side: and no other evidence of identity shall be required than that furnished by the documents of title; and the statements contained therein shall be deemed conclusive evidence of the identity of the properties respectively."

The abstract of title delivered showed a title only to 3r. 24p. in the whole:—

Held, that the purchaser having distinct notice by the above condition that the deeds would show a less quantity than that mentioned in the particulars and contract of sale, was bound to take the title as offered; and, failing to do so, that the vendor was entitled to re-sell, and to claim the deposit as forfeited.

It is no objection to a title, upon a sale by auction, that a memorandum appears amongst the title-deeds, showing that a former owner of the property (under whom the vendor derives title) had raised money thereon by way of equitable mortgage, and that there is no evidence that such charge has been released, other than that afforded by the vendor's possession of the deeds and memorandum.

THIS was an interpleader issue directed by an order of WILLIAMS, J., made in a cause of *Chambers v. Winstanley*, to try whether the plaintiff was entitled, as against the defendant, to a sum of 90*l.* being a deposit paid by the latter into the hands of Messrs. Winstanley, the auctioneers, upon a purchase by him at a public auction of certain property alleged to belong to the plaintiff.

The cause came on for trial before ALDERSON, B., at the last Summer Assizes for Surrey, when a verdict was taken for the plaintiff, subject to a motion to enter the verdict for the defendant. The facts were as follows:—

On the 3d of July, 1850, the defendant purchased at a sale by Messrs. Winstanley at the Auction Mart, London, for the price of 450*l.*, certain property which was described in the contract of sale as “the freehold cottage and copyhold paddock, comprising 1 acre, 2 roods, and 8 perches, situate at Chase Side, near Southgate, described in the particulars attached thereto as Lot 1.” In the annexed particulars of sale, the property was thus *described:—“Lot 1. The property is free- [*997 hold (with the exception of the paddock, which is copyhold), and comprises 1 acre, 2 roods, and 8 perches, situated near Southgate, &c. The premises consist of a double cottage, &c., and paddock, in the occupation of Mr. Page, &c.” The contract of sale contained the usual clause, that the title and conveyance should be completed according to the conditions of sale.

The conditions of sale were as follows:—

“1. That the highest bidder for each lot shall be the purchaser; and, if any dispute shall arise between two or more bidders, the lot in dispute shall be put up again, and resold: and no person shall advance less than 5*l.* at each bidding: and no bidding shall be retracted.

“2. The purchaser of each lot shall, immediately after the sale, pay to the auctioneers a deposit of 20*l.* per cent. on the amount of his or her purchase-money, and sign an agreement to pay the remainder on or before the 10th day of August, 1850, at the office of Mr. A., the vendor's solicitor, at, &c., when and where the purchase shall be completed: but, if from any cause whatever the purchase shall not be then completed, the purchaser making default shall pay interest at the rate of 5 per cent. per annum, on the remainder of his or her purchase-money, from the said 10th day of August until the day of completion,

without prejudice to the right of resale hereinafter mentioned: and the respective purchasers shall be entitled to receive the rents and profits of the lots purchased by him or her, as from the 24th day of June, 1850, paying the vendor, at the time of completion, a proportionate part thereof to such period.

“3. The vendor will, at his own expense, within ten days after the sale, deliver to the purchaser of each lot, or his or her solicitor, an abstract of the title to the premises purchased by him or her, and deduce a good title thereto, in conformity with these conditions; and *998] the *respective purchasers shall, within ten days from the delivery of such abstract, deliver to the said Mr. A. a statement in writing of his or her objections and requisitions, if any, in regard to the title of the lot purchased by him or her; and all objections or requisitions not made within that time shall be considered as waived, whether the abstract shall be complete or not; but, if the purchaser of either of the lots shall make any objections or requisitions respecting the title or conveyance or surrender, which the vendor shall be unable or unwilling to remove, he shall, notwithstanding any intermediate negotiations respecting the same, be at liberty to rescind the contract of such purchaser, on payment to him of his or her deposit money, without interest, costs, or other compensation.

“4. The title to the freehold portion of lot 1 shall commence with indentures of lease and release dated the 29th and 30th days of September, 1802, and, to the copyhold portion thereof, with the award of the commissioners appointed by an act of parliament for enclosing the common and waste land within the parish of Edmonton, which award was dated the 17th of September, 1804: and no objection or inquiry shall be made by either of the purchasers concerning the earlier or previous title, whether referred to or appearing or not in the subsequent title, or the validity or efficiency of the said award.

“5. All deeds of conveyance, surrenders, and other deeds and instruments necessary, upon the conveyance of each lot, shall be prepared by, and shall be executed and taken at the expense of, the respective purchasers; and all attested, official, and other copies of or extracts from any deeds, wills, awards, court-rolls, proceedings in Chancery, or other documents of whatever description, and all certificates from parochial and other registers, declarations, and all other evidence not in the *999] vendor's *possession, and any information relating thereto, whether in verification of the abstract or otherwise, which shall be required by either of the purchasers, shall be made, searched for, obtained, and given by the vendor's solicitor at such purchaser's expense; and the costs of stamping the vendor's agreement with Mr. Page (the tenant), if required, and the production and inspection of all deeds, court-rolls, and copies of court-rolls, evidences, and muniments of title, not in the vendor's possession, and the expense of all journeys incidental

to such production or inspection, shall be at the expense of the purchaser requiring the same.

“6. The several properties comprised in the foregoing particulars, are presumed to be correctly described; and *the quantities of the land shall be taken as stated*, whether more or less (*although the title-deeds and court-rolls state such quantities to be less*), without any equivalent or compensation on either side: and no other evidence of identity shall be required than that furnished by the documents of title; and the statements contained therein shall be deemed conclusive evidence of the identity of the properties respectively.

“Lastly. If either of the purchasers shall fail or neglect to comply with the above conditions, or any of them, his or her deposit money shall be forfeited to the vendor, who shall be at liberty to resell the lot sold to him, either by public auction or private contract, and the deficiency (if any) occasioned by such resale, together with all expenses attending the same, shall be made good to the vendor by the defaulter at this present sale; and in case of non-payment of the same, the whole thereof shall be recoverable as and for liquidated damages; and it shall not be necessary previously to tender a conveyance or surrender to such purchaser.”

An abstract of the vendor's title was delivered by his solicitor to the solicitors for the purchaser, on the 13th *of July, showing a title only to 3 roods, 24 perches, viz. 2 roods, 1 perch, of freehold, [*1000 and 1 rood, 23 perches, of copyhold land; whereupon the purchaser's solicitors objected to the discrepancy, and inquired whether “any evidence could be furnished to show that the quantity sold was comprised in the description stated in the abstract.” To this the vendor's solicitor answered,—“The property is believed to contain the quantity mentioned in the particulars; and, by the sixth condition of sale, the property is to be taken as stated.”

The title disclosed upon the abstract, as to the freehold portion of the property, was as follows:—

Indentures of lease and release of the 29th and 30th of September, 1802, between William Curtis, lord of the manor of Edmonton, of the one part, and Thomas Goslee and Thomas Aldridge (as trustee for Goslee) of the other part, whereby the lord conveyed to Goslee and Aldridge, their heirs and assigns, “all that piece of waste land, containing 8 poles, or thereabouts, situate, lying, and being in Hopper's Lane, near Palmer's Green, within the said manor, with the cottage thereon erected (then converted into two cottages or tenements), to which said premises the said Thomas Goslee was admitted, to hold to him and his heirs, at a court holden in and for the said manor on the 14th of May, 1799, upon the surrender of John Haynes and William Goslee; and all allotments, pieces, or parcels of land, which have been allotted to the said Thomas Goslee in lieu of the rights of common in respect of the said heredita-

ments and premises, or any part thereof,"—to certain uses, with ultimate remainder "to the use of the said Thomas Goslee, his heirs and assigns for ever, enfranchised and discharged thenceforth of and from all fines, &c., to or with which by or according to the custom of the said manor the said hereditaments were or had been subject or chargeable as copyhold or customary lands held of the said manor."

*1001] *A certificate of the commissioners of land-tax for the hundred of Edmonton, that the messuage, cottage, or tenement, with the appurtenances, situate at Southgate, in the occupation of Meadowcroft, were charged with land-tax to the amount of 4s. 8d. per annum; and that the piece or parcel of land situate on the Edmonton allotment of Enfield Chase, near Winchmore Hill, *containing 1 rood and 31 perches*,—being the allotment set out for Thomas Goslee, for his right of common in respect of the said messuage, &c.,—was charged with land-tax to the amount of 2s. 4d. per annum.

A certificate of the 20th of August, 1803, under the hands of two of the commissioners, of the redemption of the sum of 7s., being the amount of land-tax charged upon the before-mentioned premises.

An extract, confirmed by a statutory declaration, from an award of the commissioners under the Edmonton enclosure act, 39 & 40 G. 3, c. lxxix., dated the 17th of September, 1803, to Thomas Goslee, of "All that allotment or parcel of land situate on the said Chase, near Winchmore Hill Gate, containing 1 rood and 31 perches, copyhold of the said manor of Edmonton, bounded on the north by the allotment of Charles Bartholomew, on the south by the allotment of William Redhead, on the east by a road, and on the west by the allotment of Mrs. Thurkle."

A conveyance of the 21st of March, 1842 (pursuant to the statute 4 & 5 Vict. c. 21), between Charles Henry Goslee (eldest son and heir-at-law of the said Thomas Goslee, deceased, and also devisee in fee of the hereditaments therein described under the will of the said Thomas Goslee), Thomas Goslee, Mary Austen Goslee, of the first part, Joshua Fletcher of the second part, Joseph Nicoll (the plaintiff) of the third part, and John Tibbitts of the fourth part, whereby the parties thereto of the first part conveyed to Nicoll, the present plaintiff, in fee, "All
*1002] those two freehold messuages, *tenements, or cottages, with the gardens, orchards, &c., situate at Chase Side, Winchmore Hill, Edmonton, in the county of Middlesex, on the west side of a road leading to the north side of the road to Winchmore Hill aforesaid, all which said premises contain in the whole 2 roods and 1 perch, or thereabouts, and, with the dimensions, abutments, and boundaries thereof, were more particularly described in the plan drawn in the margin of the indenture, and which said gardens and orchards, and the site of which said messuages, buildings, and premises, formerly, and before the enfranchisement thereof, constituted and were known by the description of 'all that allotment or parcel of land, situate at Enfield Chase, near Winchmore

Hill Gate, containing 1 rood and 31 perches, copyhold of the manor of Edmonton, bounded on the north by the allotment of Charles Bartholomew, on the south by the allotment of William Redhead, on the east by a road, and on the west by the allotment of Mrs. Thurkle.'"

An office-copy of a decree in Chancery, of the 11th of June, 1841, recited in the last-mentioned conveyance.

A statutory declaration, of the 14th of December, 1841, of Charles Henry Goslee (party to the last-mentioned conveyance), that he was the executor of the late Thomas Goslee, and that the estate had been duly administered by him, and all debts of the testator satisfied.

And also two other statutory declarations identifying the property.

As to the copyhold portion, the title consisted of the following:—

An award by two commissioners under the Edmonton enclosure act, of the 17th of September, 1804, to Charles Bartholomew, of "all that allotment or parcel of land situate on Enfield Chase, near Winchmore Hill, containing 1 rood and 23 perches, copyhold of the said manor of the rectory of Tottenham, bounded on the north by *the allotment of John Tugwell, on the south by the allotment of Thomas [*1003 Goslee, on the east by a road, and on the west by the allotment of Jane Thurkle.

The will of Charles Bartholomew, dated the 5th of January, 1822, empowering his trustees therein named to sell all his copyhold and customary messuages, &c.

An indenture of the 2d of October, 1826, whereby the surviving trustees under the will of Charles Bartholomew conveyed to Benjamin Bond the before-mentioned allotment, "to the use of the said Benjamin Bond, his heirs and assigns, at the will of the lord or lords, lady or ladies, according to the custom of the said manor of the rectory of Tottenham, under and subject to the rents, fines, customs, and services theretofore due and of right accustomed, &c."

An admission of Benjamin Bond, at a court baron for the manor held on the 23d of October, 1826, to the allotment in question, upon a presentment of the will of Bartholomew, his death, and the indenture of the 2d of October, 1826.

An indenture of the 14th of March, 1845, between Benjamin Bond and Mary his wife, of the one part, and Joseph Nicoll, of the other part, whereby Bond and his wife conveyed to Nicoll "all that allotment or parcel of land formerly situate on and forming part of Enfield Chase, near Winchmore Hill, containing 1 rood and 23 perches, copyhold of the manor of the rectory of Tottenham, bounded on the north by the allotment of John Tugwell, on the south by the allotment of Thomas Goslee, but then of the said Joseph Nicoll, on the east by a road, and on the west by the allotment of Mrs. Thurkle."

And a surrender by Bond and wife of the same allotment at a court

baron held on the 31st of July, 1845, and an admission of Nicoll thereto.

Amongst the title-deeds submitted to the purchaser's solicitors for *1004] inspection, was a memorandum showing *that there had, in 1840, been an equitable mortgage (by deposit of the title-deeds) of the property in question by Thomas Goslee, the then owner, to one Smith, for 150*l.* Upon this being pointed out to the vendor's solicitor, his answer was, that the circumstance of the title-deeds being in the possession of the vendor, afforded sufficient evidence that that charge had been paid off.

After some correspondence upon these and other objections to the title, the vendor's solicitor gave notice, that, unless the conveyance was tendered by a given day he would resell the property, and claim the deposit as forfeited. And accordingly the property was resold on the 23d of September. The now defendant thereupon brought an action against Messrs. Winstanley, to recover back the deposit; whereupon they took out an interpleader summons.

On the part of the defendant, it was contended that there was no evidence of identity between the land referred to in the abstract of title, and that which the plaintiff professed to sell; and, further, that the defendant was entitled to be satisfied that the mortgage to Smith had been paid off.

The learned baron directed a verdict to be entered for the plaintiff for 90*l.*, reserving leave to the defendant to move to enter a nonsuit.

Peacock, in Michaelmas Term last, accordingly obtained a rule nisi.(a) He referred to *Flower v. Hartopp*, 6 Beavan, 476.

Shee, Serjt., and *Lydekker*, showed cause.—The sixth condition is a sufficient answer to the only objection upon which this rule was granted. That condition is as follows:—"The several properties comprised in *1005] the *foregoing particulars are presumed to be correctly described; and the quantities of the land shall be taken as stated, whether more or less (although the title-deeds and court-rolls state such quantities to be less), without any equivalent or compensation on either side: and no other evidence of identity shall be required than that furnished by the documents of title; and the statements contained therein shall be deemed conclusive evidence of the identity of the properties respectively." Even if the identity of the property is not strictly made out by the deeds abstracted, the defendant is by the terms of that condition precluded from taking the objection. [They then referred to the several deeds and documents for the purpose of showing, that, apart from some discrepancy of quantity, the identity of the property was sufficiently established.]

Byles, Serjt., and *Garth*, in support of the rule.—It may be conceded, that, if you say to a man, I am going to sell you this cottage and

(a) The rule was limited to the question of identity.

that paddock, though a wrong quantity be mentioned, the rule "*Præsentia corporis tollit errorem nominis; et veritas nominis tollit errorem demonstrationis*," applies. In the present case, if the vendor had shown that the title-deeds produced related to *all* the property purported to be sold, the purchaser would have been bound to take the quantities stated on the documents of title. But, to make the sixth condition applicable, the other side must assume what they are bound to prove. [MAULE, J.—Does not this amount to a sale of land "quantity unknown?"] The plaintiff sells an acre of land, and he delivers an abstract of title to half an acre; as to the other half acre, there is no abstract of title delivered at all. [MAULE, J.—That supposes a sale of land by measure. Here, the plaintiff sells the property by a certain description. He tells you it consists of a cottage, with stabling, garden, and paddock, in the occupation of Mr. Page; and he further tells you that "it comprises 1 acre, 2 roods, and 8 perches;" and it turns out to be something less.] The objection is not, that the vendor does not give us all we bought: it is, that whereas we contracted to buy 1 acre, 2 roods, and 8 perches, he gives us a title only to 3 roods, 24 perches. [JERVIS, C. J.—That may be all the property really consists of.] The vendor does not show that. There is an undefined portion of the land, to which he adduces no title. In *Flower v. Hartopp*, 6 Beavan, 476, upon a sale of land by auction, one of the conditions provided "that no further evidence of identity was to be required than was afforded by the abstract, or the deeds, instruments, or other documents therein abstracted:" the descriptions in the documents differed among themselves, and from the description in the particulars of sale: and it was held that the purchaser was entitled to have further proof of the identity." "The vendor," says Lord LANGDALE, M. R., "goes to a sale with a certain description of the property in his particulars, and he has a condition of sale which says 'that no further evidence of identity of the parcels shall be required, than what is afforded by the abstract, or the deeds, instruments, or other documents therein abstracted.' When these instruments are looked into, we find that the description contained in the last, which is a will of not less than seventy years old, differs from the description in the particulars. Then it is justly said, you are not to confine yourself to the will, but you are to look at the other instruments stated in the abstract; and, if you find that the words used in the will, being modified when compared with the expressions used in the previous deeds, induce a conclusion which identifies the property with the description contained in the particulars, then the vendor has done all that can be required. But, upon looking back to the other *descriptions contained in the three or four previous instruments, it is found that they vary more than the last instrument from the description contained in the particulars. This, therefore, does not aid the vendor, but rather makes the identity more difficult. The

lapse of seventy years would well justify a change in the state of the property, and a variation in the description: but, the instant you have a variation in the deeds, the description in the deeds cannot, of itself, be evidence of the description contained in the particulars: something else must be introduced to correct them; and therefore, although the purchaser may not be entitled to require any further evidence of the identity of the parcels than what is afforded by the deeds, yet he is entitled to have what he has bought distinguished, and, without that, it cannot be said by the vendor that he has proved by the instruments the parcels described in the particulars." [MAULE, J.—There, there was a description which was not applicable.] In Sugden's Vendors and Purchasers,^(a) where all the authorities are considered, the rule deduced from them is thus laid down:—"If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey."^(b) The rule is the same, though the land is neither bought nor sold professedly by the acre; the presumption is, that, in fixing the price, regard was had on both sides to the quantity which both suppose the estate to consist of. The demand of the vendor, and the offer of the purchaser, are supposed to be influenced in an equal degree by the quantity which both believe to be the subject of their bargain. The general rule, therefore, that, where a misrepresentation *1008] is made as to the quantity, though *innocently, the right of the purchaser is, to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation."^(c) Portman v. Mill, 2 Russ. 570, is much such a case as this. There, a contract for the sale of a farm described it as containing "349 acres or thereabouts, be the same more or less," and stipulated that the premises should be taken at the quantity above stated, whether more or less: in fact, the farm consisted of only 349 *customary* acres, which were less than the same number of statute acres, by 100 acres or upwards: and Lord ELDON said: "As to the stipulation in the contract, that the parties shall not be amenable for any excess or deficiency in the quantity of the land, and that the premises shall be taken at the quantity before stated,—I never can agree that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as is alleged to exist here." If quantity be immaterial, why mention it at all? [JERVIS, C. J.—In the case last cited, the vendor professed to give the quantity, there or thereabouts. Here, he does not: he does not profess to know.] Why then does he describe it as comprising 1 acre, 2 roods, and 8 perches? In Price v. North, 2 Y. & C. (Eq. Exch.) 620, it was also held that a

(a) 11th edit. p. 369.

(b) Citing Sir Cloudesley Shovel v. Bogan, 2 Eq. Ca. Abr. 688, pl. 1.

(c) Citing Hill v. Buckley, 17 Ves. 394, per Sir W. Grant.

misdescription of the quantity of land in regard to the acres being statute acres or customary, is not matter of compensation, but a ground for setting aside the sale. And in *Flight v. Booth*, 1 New Cases, 370, 376, 1 Scott, 190, 201, where the subject was very much considered, TINDAL, C. J., in delivering the judgment of the court, says: "It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, *and what shall be ground of compensation only. All the cases [*1009 concur in this, that, where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only: *Duke of Norfolk v. Wortley*, 1 Campb. 340, *Wright v. Wilson*, 1 M. & Rob. 207; whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale: *Jones v. Edney*, 3 Campb. 285; *Waring v. Hoggart*, R. & M. 39 (E. C. L. R. vol. 21); *Stewart v. Alliston*, 1 Meriv. 26. In this state of discrepancy between the decided cases, we think it is at all events a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract, that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones v. Edney*, where the subject-matter of the sale was described to be 'a free public-house,' while the lease contained a proviso that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal."

*JERVIS, C. J.—I am of opinion that this rule ought to be discharged. The sixth condition gives the purchaser distinct notice [*1010 that the title-deeds will show a less quantity than is mentioned in the particulars and contract of sale, and therefore that the vendor does not pledge himself to the accuracy of the description in that respect; and it further provides "that no other evidence of identity shall be required than that furnished by the documents of title," and that "the statements contained therein shall be deemed conclusive evidence of the identity of the property." It amounts to this,—I sell you a certain property, which I believe to consist of such a quantity, and which you shall take notwithstanding the description in the deeds shall show a less quantity;

and you shall require no further proof of the identity of the property sold with that described in the deeds, than the statements contained in the deeds themselves. I think the purchaser cannot be allowed to get rid of the effect of that condition by requiring identity of quantity.

The rest of the court concurring,

Rule discharged.

*1011] *METCALFE v. RICHARDSON. Jan. 24.

On the day after a bill became due, the holder's clerk called upon the drawer, and told him that the bill had been duly presented, and that the acceptor "could not pay it;" to which the drawer replied, that "he would see the holder about it:"—Held, that it was properly left to the jury to infer from this conversation that the drawer had due notice of dishonour.

Semble, that a verbal notice of dishonour is not to be construed with the same strictness as a written notice,—provided there be enough to warrant the jury in assuming that the party to whom the notice is given, is informed that the bill has been duly presented and dishonoured, and that he is looked to for payment.

THIS was an action of debt for money had and received, money paid, &c.

Plea,—a set-off for money due to the defendant upon a bill of exchange drawn by the plaintiff upon and accepted by one Dalglish, averring that the bill was duly presented for payment, and dishonoured, and that the plaintiff had due notice of the dishonour.

Replication, that the plaintiff was not nor is indebted to the defendant in manner and form as the defendant had above in his said plea alleged. Issue thereon.

The cause was tried before TALFOURD, J., at the second sitting in London in this term. In order to prove that the plaintiff had had due notice of the dishonour of the bill, the defendant's clerk was called. He stated that, the bill being due on a Saturday, he went to the plaintiff on the Monday following, and told him that the bill had been duly presented, and that the acceptor could not pay it; to which the plaintiff replied, that he would see Mr. Richardson about it.

Dalglish, the acceptor, was then called. He stated, that, three or four days before the bill became due, he, in company with the plaintiff, went to the defendant's house, and that he then explained to the latter, in the presence of the former, that he came about the bill; whereupon the defendant said: "It is not yet due; it has three or four days yet to run: you must see if you cannot make some arrangement in the mean time:" to this Dalglish replied, that it would be impossible, but that, if the defendant would hold the bill over, he would eventually pay it.

*1012] Richardson, who was called as a witness on the part of the plaintiff, said that he called upon the plaintiff three or four days after the Monday following the maturity of the bill, and told him the bill was not paid, and that he should look to him; to which the

plaintiff answered,—“I am not liable, as you have not noted the bill. And you may get it.”

On the part of the plaintiff, it was submitted that these conversations did not amount to a notice of dishonour, but were, at the most, a mere intimation of doubt as to the acceptor's ability to pay the bill; and that there was no difference in this respect between a verbal and a written notice.

The learned judge, however, thought that, the notice being a verbal one, its effect was a question for the jury: and he adverted to the rule laid down by PARKE, B., in *Lewis v. Gompertz*, 6 M. & W. 399, 403,† —“that the three facts required to be conveyed in every notice of dishonour, must be conveyed to the mind of the person to whom it is addressed, in a written or verbal notice, either expressly, or so connected with each other as to leave no reasonable doubt upon his mind as to their meaning,—viz. first, that the bill was presented when due; secondly, that it was dishonoured; and, thirdly, that the party addressed is to be held liable for the payment of it.” And the defendant's counsel, after some deliberation, declining to adopt a suggestion to amend the plea by stating a waiver of notice, his lordship left it to the jury to say whether they would infer from the conversation between the defendant's clerk and the plaintiff, that the latter had notice that the bill had been duly presented and dishonoured, and that he, the plaintiff, would be looked to for payment. The jury returned a verdict for the defendant.

Byles, Serjt., now moved for a new trial, on the ground of misdirection.—The conversations deposed to did not *amount to such a notice of dishonour as the law requires. In *Phillips v. Gould*, [*1013 8 C. & P. 355 (E. C. L. R. vol. 34), a notice in the following form,—“A bill for 30*l.*, dated the 18th of August, 1847, at three months, drawn and endorsed by R. Everett, upon and accepted by W. Tuck, and endorsed by you, lies at my office due and unpaid,”—was held insufficient. So also were the following,—“This is to inform you that the bill I took of you, 11*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expenses; and the money I must pay immediately,”—*Messenger v. Southey*, 1 M. & G. 76 (E. C. L. R. vol. 39), 1 Scott, N. R. 180: “A bill for 29*l.* 17*s.* 3*d.*, drawn by Ward on Hunt, due yesterday, is unpaid, and I am sorry to say the person at whose house it is made payable don't speak very favourably of the acceptor's punctuality; I should like to see you upon it to-day,”—*Furze v. Sharwood*, 2 Q. B. 388 (E. C. L. R. vol. 42), 2 Gale & D. 116: “This is to give you notice that a bill for 176*l.* 15*s.* 6*d.*, drawn by Samuel Maine, accepted G. Clisby, dated May 7th, 1835, at four months, lies due and unpaid at my house,”—*Furze v. Sharwood*. The learned judge ought to have told the jury that the evidence in this case did not involve the three requisites of a notice of

dishonour,—presentment, non-payment, and that the party addressed is looked to for payment of the bill.

MAULE, J.(a)—It appears that Richardson duly presented the bill in question on the Saturday, the day on which it became due, and that the conversation between his clerk and the plaintiff, the drawer of the bill, took place on the Monday following. All the parties were living in London. The clerk, it is true, does not say that the bill has been dishonoured, or is unpaid; but that Dalglish, the acceptor, *cannot pay it*. *1014] He assumes that *he has duly ascertained that: and it is plain that the sense in which the plaintiff understands the communication, is, that *he* is called upon to pay the bill. He treats it as a notice that the acceptor has not paid the bill, and that he himself is called upon to pay. Therefore, we have the fact of the bill being dishonoured, and of the drawer's being informed of the acceptor's incapacity to pay, as being established, and that the drawer is looked to for payment. And, when the plaintiff, in reply to the communication so made to him, says,—“I will see Mr. Richardson about it,”—I think no jury could come to any other conclusion than that he considered and accepted it, as it evidently was intended, as a notice of dishonour. The notice not being in writing, the jury were not restricted to the precise form of words in which the notice is given. It was competent to them to assume, and it was properly left to them to infer from the conversation deposed to, that the plaintiff had had notice of dishonour, and that he would be looked to for payment of the bill,—which is the material part of the notice. I therefore think there should be no rule.

WILLIAMS, J.—I am of the same opinion. It is clear, from the plaintiff's saying, in answer to the clerk's communication, that he would see Richardson about it, that he understood and accepted it as a notice of dishonour. There is no real ground for doubting that the evidence amounts to information given to the plaintiff that the bill had been duly presented and dishonoured, and that he would be looked to for payment.

Rule refused.

(a) JERVIS, C. J., and CRESSWELL, J., sat at the Court of Criminal Appeal.

Notice of non-payment need not be in writing. Stevens, 4 Wend. 566; Glasgow v. Pratt, 100 N.Y. 336. A verbal notice is sufficient: Cuyler v. Missouri, 336.

***WHITE v. MORRIS, GIBSON, WHEATLEY, TAYLOR, and THOMPSON. Jan. 28. [*1015**

Where goods are assigned as security for an advance of money, upon trust to permit the assignor to remain in possession of them until default in payment at the time stipulated, and upon further trust to sell them upon such default being made,—the assignee has a sufficient possession to enable him to maintain trespass against a wrongdoer.

Such an assignment, though void as against creditors, is good as between the parties, and as between either party and a stranger.

A bailiff of a county court claiming to seize goods on behalf of a judgment-creditor, is a stranger within that rule, unless he proves the legal authority under which he seized on behalf of such creditor, viz. the judgment.

In trespass against an execution-creditor and a bailiff of a county court for seizing goods under such circumstances, the plaintiff put in the warrant of execution, with the endorsement thereon by the officer that he had taken the goods under it:—Held, that the bailiff, as well as the execution-creditor, was bound to prove the judgment; and that the warrant, reciting the judgment (though put in by the plaintiff), was no evidence of such judgment.

Held also, that the circumstance of the bailiff's having, in taking the goods, acted under an indemnity from the execution-creditor, did not deprive him of the protection of the 138th section of the county court act, 9 & 10 Vict. c. 95, which entitles him to a notice of an action for anything done by him in pursuance of the act.

THIS was an action of trespass for taking certain goods alleged to belong to the plaintiff.

The three first-named defendants, Morris, Gibson, and Wheatley, pleaded not guilty, and not possessed.

The defendants Taylor and Thompson (the former of whom was the high-bailiff and the latter an under-bailiff of the county court of Sunderland) pleaded,—first, not guilty,—secondly, not possessed,—thirdly, that the alleged trespasses were committed in pursuance of the county courts act, 9 & 10 Vict. c. 95, and that no notice of action had been given to them under s. 138,—thirdly, that the alleged trespasses were committed in pursuance of the 9 & 10 Vict. c. 95, and that the action was not commenced within three calendar months next after the supposed cause of action accrued.

Upon each of these pleas issue was taken.

The cause was tried before WILLIAMS, J., at the last assizes at Durham. The facts which appeared in evidence were as follows:—One Robinson, who had carried on business as a draper at Sunderland, becoming insolvent, assigned all his household furniture and stock in *trade to trustees for the benefit of his creditors. The trustees [*1016 took possession, and sold the goods to Robinson and one Story, the latter of whom paid for them partly in money and partly by bills. The bills becoming due, and Story being unable to meet them, the present plaintiff, White, agreed to lend Robinson and Story 120*l.* upon the security of the goods in question; and the goods were accordingly assigned to White by a deed bearing date the 11th of October, 1850.

By this deed, which recited the agreement for the loan, Robinson and Story covenanted to pay White the 120*l.* on a given day, with interest in the mean time at the rate of 7*l.* per cent. per annum, and

assigned to White all the goods in a certain shop and dwelling-house (the goods in respect of which this action was brought), to hold to White, his executors, administrators, and assigns, as his and their own proper goods and chattels,—upon trust to permit and suffer Robinson and Story, their executors, administrators, and assigns, to hold the goods and premises assigned until payment of the money which should become due under the deed should be demanded, and with a power to White to sell upon default in payment. *This deed was left upon the premises in the hands of one of Robinson and Story's shopmen.*

Morris, Gibson, and Wheatley, who were manufacturers at Manchester, were creditors of Robinson at the time of the first assignment. They declined to concur in that deed, and, after the trustees had sold the property to Robinson and Story, they sued Robinson in the Sunderland county court, and obtained a judgment against him. Execution having issued upon that judgment, Taylor, the high-bailiff, and Thompson, the under-bailiff, of the county court, entered upon the premises for the purpose of seizing the goods; but, on finding that the goods had been assigned to White, they withdrew. Subsequently, however, upon *1017] receiving an indemnity from the execution-creditors, they re-entered, and seized and sold the goods.

The only evidence of the seizure and sale, was, the production of the writ or mandate directed to the high-bailiff, with his endorsement of the levy thereon.

It was submitted, on the part of the plaintiff, that the execution-creditors were not in a position to contest the validity of the assignment, without first proving the judgment, inasmuch as the statute 13 Eliz. c. 5, only makes the conveyance void as against creditors; and that Taylor and Thompson, having acted under an indemnity, were not entitled to the protection of the 9 & 10 Vict. c. 95, s. 138.

The learned judge left it to the jury to say whether or not the mortgage to White was a *bonâ fide* transaction, and also whether Taylor and Thompson were indemnified, and whether, though indemnified, they acted *bonâ fide*, believing that they were authorized to do as they did under the statute.

The jury found that the transaction was not *bonâ fide*; and that Taylor and Thompson were indemnified; but that they acted *bonâ fide*.

The learned judge directed the verdict to be entered for Morris, Gibson, and Wheatley, on both issues; and, as against Taylor and Thompson, for the plaintiff on the first issue, and for those defendants upon all the other issues,—reserving to the plaintiff leave to move.

Watson, in Michaelmas Term last, accordingly moved for a rule to show cause why a verdict should not be entered for the plaintiff upon all the issues, with damages 85*l.* or 55*l.* as the court might think fit; or for a new trial, on the ground that the verdict was against evidence. He submitted, that, the assignment not being in any event void except as

against creditors, the three first-named defendants were bound to show that they were *creditors, by producing the judgment,—citing [*1018 *Lake v. Billers*, 1 Lord Raym. 733, and *Martyn v. Podger*, 5 Burr. 2631. [MAULE, J.—Where you have recourse to the statute to avoid the conveyance, you must show that you are a creditor. But, here, the jury found that the whole was a sham.] There was no evidence to warrant that. [MAULE, J., referred to *Glave v. Wentworth*, 6 Q. B. 173, n. (E. C. L. R. vol. 51).] As the officers acted, not under the authority of the statute, but under the indemnity they had received, and thereby identified themselves with the parties, it was not competent to them to claim the protection of the statute. In *Bradley v. Carr*, 3 M. & G. 221 (E. C. L. R. vol. 42), 3 Scott, N. R. 521, it was held that the steward of a court baren is a judicial officer, and therefore is not responsible for the acts of the regular bailiffs of the court to whom process is directed; but that he is responsible where he directs the process to bailiffs specially nominated by the party who sues it out, taking an indemnity. [JERVIS, C. J.—Do you mean to lay it down as a proposition of law, that a man cannot act *bond fide* if he is indemnified?] Certainly. [JERVIS, C. J.—I cannot see why the officer is to be deprived of a right which the statute has given him, because he has taken an indemnity. Suppose the statute has said that the officer should have double costs; according to your argument, he would lose them if he were indemnified.] Undoubtedly. [JERVIS, C. J.—That would be in effect repealing the statute.] Being indemnified, the officers were not acting under the statute at all. [JERVIS, C. J.—The jury find that they were.] A rule nisi having been granted,

Knowles and *Chandler*, for the execution-creditors, and *Hugh Hill*, for Taylor and Thompson, showed cause.—This rule was obtained mainly upon the ground *that the judgment was not put in, and that it was not open to the defendants to contend that the deed was [*1019 void on the ground of fraud, unless the parties setting up the fraud were, as represented, creditors. But there is another point which may be more conveniently noticed first, viz., that the plaintiff could not set up the deed, even if it were a valid deed, for, the plaintiff had not such a possession of the goods in question as to entitle him to maintain this action. *Bradley v. Copley*, 1 C. B. 685 (E. C. L. R. vol. 50), goes further than is necessary for the decision of this case. There A., being indebted to B., by a bill of sale, which was found to have been *bond fide* executed, conveyed to him all his stock in trade, household furniture, &c., absolutely. The bill of sale (which was under seal) contained a covenant by A. to pay the debt *on demand*, and a proviso for redemption on payment of the debt and interest *on demand*, and a further proviso that the assignor should continue in possession until default. The goods having been subsequently, and before any demand made by B., seized by the sheriff under a *fi. fa.* upon a judgment entered up

against A. on a warrant of attorney,—it was held that B. had not such a right of immediate possession as to entitle him to maintain trover against the sheriff. TINDAL, C. J., says: “Ever since the case of *Gordon v. Harper*, 7 T. R. 9, I take the rule to have been, that, to entitle a party to maintain trover, he must have the right of possession, as well as the property in the goods sought to be recovered. That case has been followed by many: and I am unable to distinguish it from the present case, except in this, that there the right of the landlord to the possession of the goods was postponed for a certain and definite time, whereas here the goods were to revert to the plaintiffs at an uncertain time, viz., on default of Boulton (the assignor) in payment of the debt *on demand*. When the conversion com-
 *1020] plained of took place, the plaintiffs were not in a situation to require possession of the goods: I therefore think the case is governed by *Gordon v. Harper*, and that the plaintiffs are not entitled to maintain trover.” And the other judges expressed themselves in similar terms. [MAULE, J.—In that case, the right of possession came by way of proviso: here, the deed assumes to give the assignee immediate possession of the goods upon trust.] In *Bradley v. Copley*, all the words were words of absolute assignment: this amounts to a contract on the part of White to permit Robinson and Story to have a possessory title to the goods, until demand. [MAULE, J.—To have and enjoy and to use them in such a manner as such things are usable.] *Wheeler v. Montefiore*, 2 Q. B. 133 (E. C. L. R. vol. 42), 1 Gale & D. 493, is almost identical with *Bradley v. Copley*. There, by indenture between F. and W., it was recited that F. was indebted to W. in 272*l.*, that it had been agreed between them that F. should execute a mortgage of a certain messuage, with the fixtures and certain chattels; and it was witnessed, that, in pursuance of that agreement, and in consideration of the 272*l.* so due, and of 5*s.*, F. did grant, bargain, sell, and demise to W. the messuage, for a term of years, *habendum* to W. thenceforth for the term, subject to the proviso thereafter contained; and also that, for the consideration aforesaid, F. did bargain, sell, assign, transfer, and set over to W. the fixtures and chattels, *habendum* to W. for his own absolute use and benefit, subject to the proviso thereafter contained: provided, and it was thereby agreed, that, if F. should pay the 272*l.* on the then next 24th of June, W. should re-convey; provided also, and it was thereby further agreed, that, if default in payment should be made on the day aforesaid, it should be lawful for W.
 *1021] to enter upon, receive, and *take the rents and profits of the premises, and, if he should think proper, of his sole authority, to sell or underlet them, and to sell the fixtures and chattels, and deliver them to the purchaser or tenant; and that W. should stand possessed of the money arising from such sale, and of the rent and profits in the mean time, in trust to discharge the expenses of the sale

and performance of the trusts, and then to pay himself so much as should remain unpaid of the 272*l.*, and W. should afterwards stand possessed of the premises and chattels, and the surplus proceeds, in trust for F. And F. covenanted to pay the 272*l.*, with interest, on the day mentioned, and that, notwithstanding any act, &c., the several premises should remain on the trusts thereinbefore declared, as long as any part of the 272*l.* should continue on that security. F. was in actual possession at the time of executing the indenture, and so remained (the 272*l.* continuing unpaid) at a day before the 24th of June, when M. (a third party) broke and entered the premises, and seized the fixtures and chattels. It was held, that W. could not recover against M. in trespass *quare clausum fregit*, for the entry, or for the seizure laid as aggravation; and that, on a plea that the house, fixtures, and chattels were not the house, &c., of W., W. must be nonsuited. Lord DENMAN, in giving the judgment of the court, says: "There is no covenant that Franks shall remain in possession till the 24th of June: but, looking at the whole deed, we are of opinion that the plaintiff's right to take possession did not attach until the 24th of June, and therefore that the verdict found for him on the second plea is wrong."

As to the third and fourth issues,—The writ was put in by the plaintiff in order to fix the high-bailiff. It recites the proceedings in the county court, and then states the mandate: as against the person putting it in, it clearly was some evidence of the judgment. In *Lake v. Billers*, 1 Lord Raym. 733, and *Martyn v. Podger*, 5 Burr. [*1022 2631, the writ was put in by the sheriff. *Bessy v. Windham*, 6 Q. B. 166 (E. C. L. R. vol. 51), is precisely in point: it was there held, that an assignment of goods in fraud of creditors is valid as between the parties to the deed, and as between either party and a stranger; that a sheriff claiming to seize the goods on behalf of a judgment-creditor is a stranger within that rule, if he does not prove the legal authority under which he seized on behalf of such creditor; that, for this purpose, it is sufficient, in trespass for the seizure, *if he prove the writ*; and that there is some evidence of the writ, if *the plaintiff* puts in the sheriff's warrant to his officer, and that recites a writ at the suit of the judgment-creditor. In *Haynes v. Hayton*, 6 Law Journ. K. B. (Old Series) 231, which was an action against the sheriff for money had and received, the plaintiff, in order to fix the sheriff with receipt of the money, which he had levied as forfeited recognisances, gave in evidence a letter from the person who had been his under-sheriff, addressed to the plaintiff, in these words:—"The sessions, as I have been informed, have remitted the forfeited recognisances due from you, and which, by a writ issued against you, were levied previously to the October Sessions, 1824, first directing that the sum of 13*s.* 4*d.* should be deducted therefrom: but the lords of the treasury contend that there is no power vested in the sessions to remit moneys levied

by the authority of that court for forfeited recognisances. Still, as I have not heard further from their secretary, I am desirous to repay the money levied by the sheriff for such forfeited recognisances, under the authority of the quarter sessions. I will, therefore, thank you to send me your receipt for the amount, as received of W. C. Hayton, Esq., late sheriff of Hertfordshire; and I will pay the *1023] *same. I shall expect, at the same time, to be paid the fees due to the sheriff." PARKE, J., on the trial, held, "that the letter of the undersheriff, if it was evidence to fix the sheriff with the receipt of the money, was also evidence to infer that he had received it through a proper authority." He therefore held it to be unnecessary for the sheriff to go into any evidence, and nonsuited the plaintiff. On motion to set aside the nonsuit, Lord TENTERDEN, after reading the letter, said: "You are to make this evidence against the sheriff, and yet not give him credit for an assertion there made, which is in his favour. This seems to me to be the hardest measure possible." And the rule was refused. In *Goss v. Quinton*, 3 M. & G. 825 (E. C. L. R. vol. 42), 4 Scott, N. R. 471, the plaintiffs gave in evidence an examination of the defendant before commissioners of bankruptcy, to prove that he had taken the property in respect of which the action of trespass was brought. In that examination the defendant had stated the substance of a written agreement, which became matter of defence in that action; and this court held that this was some evidence to go to the jury, of the existence of the agreement, without producing or accounting for the absence of the original document. In *Glave v. Wentworth*, 6 Q. B. 173, n. (E. C. L. R. vol. 51), it was never suggested that any evidence of the *judgment* was requisite: and, if it was, there was here some evidence of it. In *Ogden v. Hesketh*, 2 Car. & K. 772 (E. C. L. R. vol. 61), where the sheriff of the county palatine of Lancaster was sued in trover for goods alleged to have been wrongfully seized and sold under an execution, and the defence was that the plaintiff claimed the goods by virtue of an assignment which was void as against creditors,—it was held by COLERIDGE, J., that the sheriff could take advantage of this defence without, as in ordinary cases, showing his authority by *1024] proof of the writ, and *that proof of the mandate to him from the Chancellor of the county was sufficient for that purpose. The county court act, 9 & 10 Vict. c. 95, s. 94, and the rules founded thereon, prescribe the form of the writ of execution, which recites the judgment. And, when the bailiff endorses thereon that he has executed the writ, he must be supposed to affirm that he has done so in pursuance of the judgment therein recited. [MAULE, J.—He affirms that the writ says so, not that the fact is so.] There was ample evidence to show the deed fraudulent, and therefore proof of the judgment was unnecessary.

The jury found that Taylor and Thompson were indemnified; but

that they acted *bonâ fide* under a belief that they were authorized by the statute in seizing the goods. There is nothing inconsistent in that. The circumstance of their having taken an indemnity does not deprive them of the protection of the act.^(a) In *Booth v. Clive*, 10 C. B. 827 (E. C. L. R. vol. 70), 2 L. M. & P. 283, in case against a judge of a county court for making an order for committing the plaintiff to gaol for disobedience of an order for payment of certain instalments, after due service upon him of a writ of prohibition, the jury were told, that if the defendant acted under a *bonâ fide* belief that his duty as judge of the *county court rendered it incumbent on him to do so notwithstanding the prohibition, the act must be considered as done in [*1025 pursuance of the county court act, and he was entitled to notice of action,—and this was held to be no misdirection. All the authorities were cited and commented upon by the court in that case. *Bradley v. Carr*, 3 M. & G. 221 (E. C. L. R. vol. 42), 3 Scott, N. R. 521, which was cited on moving, has no application here: there, the process was directed to special bailiffs; the indemnity altered the position of the parties; here, it did not.

Watson and Seymour, in support of the rule.—*Watson v. Macquire*, 5 C. B. 836 (E. C. L. R. vol. 57), is an authority to show that the plaintiff here had a sufficient possession of these goods to enable him to bring trespass against a wrongdoer. The deed was a perfectly good deed as between the parties. It was only void as against creditors. The defendants, therefore, could only justify by showing that they were creditors, or that they represented creditors. They were bound to show the judgment. As to the evidence of the judgment, the rule deducible from all the cases, is, that, where the party justifying is a judgment-creditor, he must prove the judgment; but that the sheriff does enough if he produces the writ, unless, as in *Bradley v. Carr*, he, by taking an indemnity, so identifies himself with the judgment-creditor as to place himself in the same position with him; and then he is bound also to put in the judgment. The rule is thus laid down in 1 Williams's *Saunders*, 298, n. (e), —“Where the defendant justifies under final process, there is a well-known distinction between the cases of the party to the suit and of the sheriff or his officer, that the former must show the judgment in pleading as well as the writ, but for the latter it is enough to *show [*1026 the writ.”^(b) The position of the party is altered by his taking an indemnity. In *Martyn v. Podger*, 5 Burr. 2631, the question was,

(a) The 138th section of the 9 & 10 Vict. c. 95, “for the protection of persons acting in the execution of this act,” enacts “that all actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within three calendar months after the fact committed and not afterwards, or otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if after action brought a sufficient sum of money shall have been paid into court, with costs, by or on behalf of the defendant.”

(b) Citing *Andrews v. Marris*, 2 Q. B. 17 (E. C. L. R. vol. 42), 1 Gale & D. 286.

whether it was necessary for the defendants (sheriff's officers), who justified under a *fi. fa.*, to produce and prove a copy of the judgment upon which the writ was grounded. *Lake v. Billers*, 1 Lord Raym. 733, was cited as in point for the plaintiff. That was trespass brought against the sheriff for goods taken. Upon not guilty pleaded, the sheriff gave in evidence that he levied them in execution by virtue of a *fi. fa.* The plaintiff made title to the goods by a prior execution, but fraudulent, and by a bill of sale made of them to him by the officer (viz. the sheriff predecessor to the defendant). And upon the trial before HOLT, C. J., it was ruled by him, "that the defendant, though sheriff, ought to give in evidence a copy of the judgment." But it would have been otherwise if the trespass had been brought by the person against whom the *fi. fa.* issued. Lord MANSFIELD said: "That case proves, that, as the action is brought by a stranger, the judgment must be proved: and the general impression is, that it is necessary to produce the judgment." *Ackworth v. Kempe*, Dougl. 40, is to the same effect. These three cases were cited in *Bessey v. Windham*, 6 Q. B. 166 (E. C. L. R. vol. 51); but the court take no notice of them in their judgment, which, though inconsistent with them, clearly did not intend to overrule them. *Bessey v. Windham* has never been considered a satisfactory decision. Assuming, however, that it is good law, all it amounts to is this,—that, if the plaintiff puts in the warrant, to connect the officer with the sheriff, he makes it evidence of the statement contained in it, viz., that he acted under a writ: nothing more. The cases of *Haynes v. Hayton*, 6 Law Journ. K. B. (Old Series) 231, and *Goss v. *Quinton*, 3 M. & *1027] G. 825 (E. C. L. R. vol. 42), 4 Scott, N. R. 471, upon which the court profess to ground their decision, proceeded upon a totally different principle. By putting in the writ, how can the plaintiff be said to admit that everything stated therein is true? In the case of admissions, however, it would manifestly be unjust if a party were to be permitted to use half and reject the rest. *Glave v. Wentworth*, 6 Q. B. 173, n. (E. C. L. R. vol. 42), is in point. That was trover against the sheriff for seizing goods under an execution at the suit of G. and H. To fix the sheriff, the warrant, reciting the *fi. fa.*, was put in. The plaintiff claimed under an assignment to him from the debtor: the defence was, that the assignment was fraudulent and void against creditors. It was objected for the plaintiff, that the warrant should be put in, to show that the sheriff was acting for a creditor. But PARKE, B., held, that, the assignment being good between the parties to it, and only void against creditors, the writ itself must be produced, otherwise the sheriff was a wrongdoer; and, as the writ could not be produced, he directed a verdict for the plaintiff. *Kine v. Evershed*, 10 Q. B. 143 (E. C. L. R. vol. 59), *Hughes v. Buckland*, 15 M. & W. 346,† 3 D. & L. 703, and *Booth v. Clive*, 10 C. B. 827 (E. C. L. R. vol. 70), 2 L. M. & P. 283, show that it was a question entirely for the jury, whether the officers acted *bonâ fide* in the

reasonable belief that they were acting in pursuance of the statute. It was quite clear here that they would not have executed the writ at all unless indemnified: they were acting, therefore, under the indemnity, and not in pursuance of the act.

JERVIS, C. J.—I am of opinion that the verdict as delivered at the trial cannot stand; but that this rule ought not to be made absolute in the terms in which it was moved, but must be modified. The first point urged by *Mr. Hill, upon the plea of not possessed, is applicable to both classes of defendants. He contended that no [*1028 present possession of the goods in question passed to the plaintiff under the deed of assignment of the 11th of October, 1850, sufficient to entitle him to maintain this action; and, in support of this view, he relied upon the cases of *Bradley v. Copley* and *Wheeler v. Montefiore*. But a comparison of the deeds in those cases with the language of the deed here, will show that they have no application. Here, a right to the possession did pass to the plaintiff by the deed, though it was encumbered with a trust, but which trust is quite consistent with the right to the possession remaining in the plaintiff. In the cases cited, however, instead of a trust, there was a proviso to the effect, that, until default made, the assignors should have possession, and no right to the present possession passed to the assignees. Those cases, therefore, are clearly inapplicable. This resolves the case into the main point which was argued by Mr. Watson. There are two classes of persons who are defendants here,—three, viz. Morris, Gibson, and Wheatley, who were plaintiffs in the court below, and two, viz. Taylor and Thompson, who were officers of the county court. It may be that the two classes of defendants might be dealt with differently: but it seems to me that there is no necessity in this case to make any distinction between them. It must be assumed that the instrument of the 11th of October, 1850, was intended by the parties to operate as a deed: and, though fraudulent and void as against creditors (as the jury have found), it is a perfectly good deed as against all persons except creditors. It is an established rule of law,—never doubted until the case of *Bessey v. Windham*,—that the mere production of the writ, and nothing more, will not enable the sheriff to show that a deed, good as against all except creditors, is fraudulent and void. He must show that he represents *a creditor. For this purpose, the bare production of the writ [*1029 is not enough. The writ merely authorizes and directs the sheriff to do a certain act, and his endorsement or return thereon is a mere statement that he has done as he was directed. There is no statement that a judgment exists; but only that somebody says that a judgment has been obtained. I think that the production by the plaintiff of the writ in this case, was not evidence for the defendants that a judgment existed. I am aware, that, in coming to this conclusion, we cannot avoid conflicting with the decision of the Court of Queen's Bench in

Bessey v. Windham, where it was held that the officer was protected by the warrant, although there was no evidence of the existence of any judgment. It is true that Lake v. Billers and Martyn v. Podger were cited upon the argument of that case. But it is equally true that there is no reference to either of them in the judgment; nor anything to indicate that the court intended to overrule them. I am also sorry to say, that, in holding as we do in this case, we are apparently conflicting with the decision of the Queen's Bench in Bessey v. Windham, upon the other point. But that will not affect our decision. That case proceeded on the ground of admissions of the party: but, whether it proceeded upon a correct application of the principle of admissions by parties, I will not stop to inquire. I think that rule is not applicable here. The officer is only interested in discussing whether there is a writ or not: it is immaterial to him whether there is a judgment or not. He, therefore, cannot be taken to have made a declaration at the time, of the existence of a judgment. I think, that, to entitle the defendants in this case to dispute the title of the plaintiff, they were bound to do more than produce the writ; they ought to have produced and proved the judgment. The plaintiff, therefore, was entitled to the verdict upon the second issue, of not possessed, as against *all the *1030] defendants. With regard to the issues upon the third and fourth pleas of Taylor and Thompson, the jury found that the officers were acting *bonâ fide* under a belief that they were authorized by the county court act. That finding is consistent with the decision of this court in Booth v. Clive,—where, in an action upon the case against a judge of a county court for making an order for committing the plaintiff to gaol for disobedience of an order for payment of certain instalments, after due service upon him of a writ of prohibition, the jury were told, that, if the defendant acted under a *bonâ fide* belief that his duty as judge of the county court rendered it incumbent on him to do so notwithstanding the prohibition, the act must be considered as done in pursuance of the county court act, and he was entitled to notice of action: and it was held that this was no misdirection. How can the circumstance of their taking an indemnity show that the officers were not acting in pursuance of the statute? It is undoubtedly a fact in the case: but, notwithstanding that fact, the jury were well warranted in finding that they were *bonâ fide* acting in pursuance of the act, and therefore they were entitled to a notice of action, as well as to the other advantages given to them by the 138th section of the 9 & 10 Vict. c. 95.

The rule must therefore be made absolute, to enter the verdict for the plaintiff on the first and second issues as against all the defendants, and for the defendants Taylor and Thompson on the third and fourth.

MAULE, J.—I am of the same opinion. As to the plaintiff's not being possessed, the distinction between this case and those relied on

by Mr. *Hill* has been pointed out by the Lord Chief Justice in a manner quite satisfactory to my mind. The deed was one under which the plaintiff was bound to take possession of the goods assigned, for the purpose of enabling him to perform the *trusts. The main question is, whether the defendants Taylor and Thompson were [*1031 shown to have acted under a judgment. Now, all that is shown, is, an endorsement by one of them on the back of the process of execution, stating that he has executed it. It is said that the writ having been produced by the plaintiff, with the endorsement upon it, was sufficient proof of the matters of fact stated in the writ; and cases were cited in which it has been held, that, where a statement made in writing, or a conversation, by a party to a suit, is given in evidence, the opposite party is entitled to have the whole context given in evidence. That constantly occurs in cases of conversations. But the question here is, whether there is any statement of a matter of fact, of which statement the writ forms a part. Now, the officer, in saying "I executed the within writ," simply says, "I took the goods, and I took them in consequence of having received this writ." He cannot be considered as thereby affirming that there is a judgment. So, where a sheriff grants a warrant, in which he recites a writ; all the sheriff says, is,—“I order you to take the goods by virtue of a writ to me directed.” He does not mean to assert, nor does he assert, that that which is stated in the writ is true. He makes no affirmation by his conduct as to the truth of the matters stated in the writ. That certainly brings us into conflict with *Bessey v. Windham*. That was an action of trespass against a sheriff for seizing goods. The defence was, that the goods were not the goods of the plaintiff as against the execution-creditor, the assignment under which the plaintiff claimed them being fraudulent and void as against creditors. On the part of a plaintiff, it was objected that the defendant did not show that he acted for a creditor; for that, in order to show that, he was bound to prove the judgment and the writ. The warrant was produced, but not the writ; but, as the warrant recited the writ, *the court held that there was some evidence of the writ. They do not go on to say, that, if you produce the writ [*1032 and the warrant, you must prove the judgment: there was no necessity for going into that distinction. It was a necessary step there to found the defence, to prove the writ: and the court held, that the production of the warrant was some evidence of the writ, because, the warrant recited it. They said this upon the authority of *Haynes v. Hayton* and *Goss v. Quinton*. In the former of these cases, the undersheriff's letter, in which he admitted that he had received a certain sum of money, was put in for the purpose of proving that he had received the money; and it was held, that the letter was also evidence of the facts therein stated which tended to excuse the undersheriff. That is perfectly simple, and quite conformable to the general rule. In *Goss v. Quinton*, we held,

that the plaintiffs, who were assignees of a bankrupt, by offering the defendant's examination as evidence that he took certain property, thereby made his cross-examination evidence in the cause, in which, in answer to a question put to him by his own attorney, he stated that he had purchased the property under a written agreement,—without producing or accounting for such agreement, and without notice to produce it. The evidence in both these cases was offered as proof of the matters of fact stated in the documents: but, in *Bessey v. Windham*, the warrant was not offered as proof of any matter of fact therein affirmed: all it was offered as proof of, was, that the sheriff ordered the goods to be seized, and that, at the time he did so, he affirmed that he had a writ. The warrant was merely in the nature of a declaration accompanying an act, but not evidence of the truth of that declaration. A person takes my goods, and says, while taking them, that they are not my property: I may prove what he says, without giving any proof of the matter of fact so affirmed. This distinction *1038] seems *to have been overlooked by the Court of Queen's Bench in *Bessey v. Windham*: and that case is directly opposed to *Glave v. Wentworth*, where it can hardly be supposed the point could have been overlooked. That was an action of trover against the sheriff for taking goods which the plaintiff claimed under an assignment similar to that in the present case. The plaintiff put in the warrant, which recited the writ. It was argued there, that, to ground the defence—which was, that the assignment was colourable and void as against creditors,—the writ ought to have been put in, to show that the sheriff was acting for a creditor. It was not contended that the judgment also should have been put in; it may be that it might have been arguable that the judgment was not necessary in that case. PARKE, B., ruled, that the assignment being good as between the parties, and void only as against creditors, the writ itself must be produced, otherwise the sheriff was a wrongdoer: and he directed a verdict to be entered for the plaintiff. That direction was clearly wrong if the decision in *Bessey v. Windham* was right. In the ensuing term, *Baines*, for the defendant, acquiescing in the ruling of PARKE, B., moved for a new trial, upon affidavits of surprise. That case clearly shows that the mere recital of the writ in the warrant will not do. The statement of the defendant, that he executed the writ, is no proof that there was a judgment. I therefore think the plaintiff in this case was entitled to a verdict upon not possessed.

As to the other point, it is said that the defendants Taylor and Thompson could not claim the protection of the county court act, because they had taken an indemnity. I concur with the Lord Chief Justice in thinking that that circumstance is not inconsistent with the finding of the jury, that the officers *bonâ fide* acted in pursuance of the

statute; and that, upon the whole, the rule should be modified in the way he has suggested.

*CRESSWELL, J.—I am of the same opinion. The assignment was clearly an operative assignment as between the parties: it [*1034 was intended to convey the legal property in the goods to the plaintiff, subject to the trusts. I can understand that parties may go through the ceremony of executing a thing which is not intended to operate as a deed. But it is not suggested that that is the case here. This assignment can only be disputed by creditors. To show that the three first-named defendants were creditors, it was necessary to prove the judgment. The writ was no evidence of a judgment. As to the case of *Bessey v. Windham*, I am rather disposed to concur in the ruling of PARKE, B., in *Glave v. Wentworth*: the recital in the warrant was no proof of the writ. This, therefore, is a case in which the issue on not possessed should have been found against the defendants, the plaintiff having proved the assignment, and that which was attempted to be proved on the other side being no answer at all. As to the other issues, the only evidence to show that the officers were not acting in pursuance of the statute, was, the fact of their having taken an indemnity. But that fact was really entitled to little or no weight. Mr. *Watson* complains, that if the defendant had given him a reply, he could have produced such an impression upon the jury as to the other issues, that he would have secured a verdict on these also. All I can say to that, is, that, if he had done so, he would have misled the jury. I think the rule will be properly disposed of in the way suggested.

WILLIAMS, J.—I am of the same opinion. In deciding as we do, I think the court are only reverting to the doctrine which has been long established, that, where the plaintiff is any other than the execution-debtor, the sheriff can only justify the seizure by showing the judgment as well as the writ. It cannot be denied that this decision *is [*1035 directly opposed to that of the Court of Queen's Bench in *Bessey v. Windham*. I think that was a mistaken decision: it proceeds upon the erroneous assumption that the production of the writ is sufficient evidence of the judgment. Lord DENMAN, in giving the judgment, does not advert to *Lake v. Billers* or *Martyn v. Podger*, both of which directly conflict with *Bessey v. Windham*. I do not think it necessary to consider whether the Court of Queen's Bench were right upon the second point in that case. The question here, is, whether there was sufficient evidence of the judgment. I think it is quite clear there was not. Upon the other issues, I concur with what has fallen from the rest of the court.

Rule absolute, to enter the verdict for the plaintiff on the second issue (without damages; as to the rest, rule discharged).

DOE d. RICHARDS v. LEWIS.

RICHARDS v. LEWIS. *May 10.*

A secret settlement made by a woman whilst under treaty of marriage, though liable to be set aside in a court of equity, is not necessarily void in a court of law.

A., pending a treaty of marriage between her and B., without B.'s knowledge, made a settlement of certain leaseholds, to herself for life, remainder to C., her son by a former marriage, remainder over to D.:—Held, that this deed was not avoided by the marriage, under the statute 27 Eliz. c. 4,—the husband not taking as a purchaser.

The deed (the execution of which did not appear to have been attested) was deposited by A. and C., shortly after its execution, with E., an attorney, with instructions to give it up only to those two together. After the death of A.'s husband, A. and C. went together to E., and got back the deed. A. died. In an ejectment brought by one claiming under C. against one claiming under a mortgage from A., it was proposed to give secondary evidence of the contents of this deed, upon proof that an unsuccessful search for it had been made at the house of A., and upon calling one of the two trustees named in it, who stated that he had never seen or heard of the deed:—Held, that, notwithstanding the circumstances under which it was executed, the deed might still be a valid deed; but that sufficient search had not been made to let in secondary evidence of its contents, inasmuch as no inquiry had been made as to the other trustee.

A new trial, however, was granted, upon an affidavit of surprise in this respect.

Held also, that declarations made by A. about the time of the supposed execution of the deed, to the effect that she had given the property to her son, reserving only a life-interest to herself,—were not admissible, as cutting down her interest.

A voluntary settlement made after marriage, but without actual fraud, whereby a chattel interest of the wife's was conveyed in trust to the husband and wife for their joint lives and the life of the survivor, remainder to the wife's son by a former marriage, is not avoided under the statute 27 Eliz. c. 4, by a mortgage made by the wife after the death of her husband.

THESE two actions were brought to try the title to certain leasehold premises at Merthyr Tydfil and Blaenant, near Aberdare, Glamorganshire.

*1036] *Doe d. Richards v. Lewis was an action of ejectment brought to recover possession of the property, and was tried before TALFOURD, J., at the last Spring Assizes at Monmouth.

Richards v. Lewis was an action of detinue brought to recover the title-deeds of the same property, and was tried before WILLIAMS, J., at the last Spring Assizes at Glamorgan.

The circumstances out of which the actions arose were as follows:—

The plaintiff, Thomas Richards, who was a seaman, claimed the property in right of his wife, whose maiden name was Emma James, and who, on the 27th of April, 1833, married one Rhys Morgan, after whose death (which took place on the 31st of March, 1841), she, on the 29th of May, 1841, married Thomas Richards, the lessor of the plaintiff in the ejectment, and plaintiff in the action of detinue.

The defendant was a merchant residing at Merthyr Tydfil, who had been some years in possession of the property, claiming under a mortgage made to him on the 18th of December, 1840, by one Catherine Saunders, and a conveyance made to him in 1841 by one Llewellyn Jenkins.

William Joseph, being possessed of freehold property in Monmouthshire, and of leasehold property in Glamorganshire, married Catherine

Morgan, the widow of *Llewellyn Morgan, by whom she had a son, Rhys Morgan. Catherine also had an illegitimate son, Llewellyn Jenkins, before her marriage with Morgan. [*1037

On the 13th of September, 1822, a lease was made by Samuel and Thomas Rees to William Joseph and Rhys Morgan, and the survivor, for the lives of certain persons therein named, and a sufficient period to make up ninety-nine years, demising to them certain leaseholds in Glamorganshire.

William Joseph died in 1826, having on the 4th of November in that year made a will bequeathing all his property to his wife Catherine.

On the 26th of May, 1829, Catherine Joseph, in contemplation of a marriage with one David Saunders, unknown to Saunders made a voluntary settlement conveying the leaseholds to Morgan Williams and John Bruce Pryce, in trust for herself for life, then for Rhys Morgan and his children, and, in default of issue of Rhys Morgan, to her illegitimate son, Llewellyn Jenkins, and his issue. This deed was deposited by Catherine Joseph with one Thomas, an attorney at Swansea, with instructions to give it up only to herself and Rhys Morgan together: and it remained in Thomas's possession down to the year 1841, a few months before Catherine's death (but after the death of David Saunders), when she and Rhys Morgan together obtained it from him.

The marriage between Catherine Joseph and David Saunders took place on the 9th of June, 1829.

On the 27th of April, 1833, Rhys Morgan married Emma James, afterwards the wife of the plaintiff.

By indenture of settlement bearing date the 20th of March, 1837, between David Saunders and Catherine his wife, of the first part, Rhys Morgan of the second part, Thomas Greenway of the third part, and John Howard of the fourth part,—reciting that David Saunders and Catherine his wife were seised in fee in her right of *and in the messuages, &c., thereby released; and were possessed also in [*1038 her right of the leasehold premises thereby assigned, for the residues of the several terms of years therein respectively; and that they had determined to make the settlement of the freehold and leasehold hereditaments and premises thereafter contained: it was witnessed, that, in pursuance of the said determination, and in consideration of the love and affection which the said David Saunders and Catherine his wife had for Rhys Morgan, and of 5s. paid to them by him, they, the said David Saunders and Catherine his wife conveyed certain freehold property therein described to Thomas Greenway and his heirs, to such uses, for such estates, and generally in such manner as the said Rhys Morgan should by any deed or deeds appoint, and, in default of, and until, and subject to, such appointment, and so far as any such, if incomplete, should not extend, to the use of Rhys Morgan and his assigns, for life; and, after the determination of that estate by any means in his life-

time, to the use of the said Thomas Greenway, his heirs and assigns, during the natural life of, and in trust for, Rhys Morgan; and, after the determination of that estate, to the use of the said Rhys Morgan, his heirs and assigns, for ever: And it was further witnessed, that, in pursuance, &c., they the said David Saunders and Catherine his wife, did grant, bargain, sell, and assign unto John Howard, his executors, administrators, and assigns, "all that messuage, &c., situate in Chapel Street, in Merthyr Tydfil, then or late in the tenure or occupation of the said David Saunders; and also those four messuages, &c., adjoining the last-mentioned messuage, &c., then or late in the several tenures or occupations of Hugh Williams, &c.," to hold the same premises unto the said John Howard, his executors, &c., for the residue of the respective terms thereof,—upon trust for David Saunders and Catherine his wife, *1039] and the survivor of them, and to *permit them or either of them, and the survivor of them, their, his, or her assigns, to receive and take the rents, issues, and profits thereof, and of every part thereof, during so much of the said term or terms of years as they the said David Saunders and Catherine his wife, and the survivor of them, should happen to live; remainder, upon trust for the sole use and benefit of Rhys Morgan, his executors, administrators, and assigns: And it was further witnessed, that, in pursuance, &c., they the said David Saunders and Catherine his wife, did grant, bargain, sell, and assign unto the said John Howard, his executors, &c., "all that messuage, &c., situate near The Swan Inn, in Merthyr Tydfil aforesaid, now or late in the tenure or occupation of William Davies, &c., and also all that messuage, &c., situate at Blaenant, near Aberdare, in the county of Glamorgan, then or late in the tenure or occupation of Rees Lewis Tyler, to hold to John Howard, his executors, administrators, and assigns, for the residue of the several terms thereby granted,—upon trust for the said David Saunders and Catherine his wife, and to permit them, him, or her to receive and take the rents, issues, and profits thereof for and during so much of the said several terms as the said Catherine Saunders should happen to live; remainder, upon trust for the sole use and benefit of the said Rhys Morgan, his executors, administrators, and assigns. Then followed the usual covenants by Saunders with Rhys Morgan against encumbrances, for quiet enjoyment, &c.

By indenture of settlement (post-nuptial) bearing date the 20th of November, 1837, between Rhys Morgan and Emma, his wife, of the first part, George Laurence of the second part, and John Howard of the third part,—reciting the settlement of March the 20th, 1837; and further reciting that "the said Rhys Morgan was desirous of making a provision for the said Emma, his wife, and had for that purpose deter- *1040] mined to convey or otherwise *assure the said freehold hereditaments and premises comprised in the said thereinbefore in part recited indenture, unto the said George Laurence, his heirs and

assigns, upon the trusts thereafter declared, and to declare the trusts upon which the said John Howard should stand possessed of and interested in the said leasehold premises, subject to the estates and interests of the said David Saunders and Catherine Saunders therein respectively,"—it was witnessed,^(a) that, in consideration of the premises, and for the purposes aforesaid, Rhys Morgan granted, bargained, sold, &c., unto Laurence, his heirs and assigns (in the actual possession, &c.), all that freehold estate, consisting, &c.,—upon trust to convey and assure the same, and pay and apply the rents, &c., unto or for the benefit of such person or persons, for such estate and interest, as they the said Rhys Morgan and Emma his wife, at any time during their joint lives, in and by any deed in writing, sealed and attested, &c., should jointly direct, limit, or appoint; and, in default of such direction, limitation, or appointment, upon trust that Laurence, his heirs, executors, administrators, and assigns, should stand possessed of the premises upon trust to pay, apply, and dispose of the rents, issues, and profits thereof unto the said Rhys Morgan and his assigns, or otherwise, at his or their request, permit and suffer him or them to receive the same for his and their own use and benefit during his life; and, after the decease of the said Rhys Morgan, upon trust to pay the rents, &c., unto the said Emma, the wife of the said Rhys Morgan, in case she should be then living, and her assigns, or otherwise, at her or their request, permit and suffer and authorize and empower her and them to receive, retain, and take the same to and for her and their own use and benefit for and during the term of her natural life; and, from *and after the [*1041 decease of the survivor of them the said Rhys Morgan and Emma his wife, upon trust to sell the said freehold hereditaments and premises, and stand possessed of and interested in the moneys to arise by such sale, upon trust, after payment of expenses, to pay the residue equally amongst the children of Rhys Morgan and Emma his wife, as tenants in common, share and share alike, if more than one, and if but one, then unto such one or only child, his or her executors, administrators, or assigns, &c.: Proviso, that, in case all and every the children of the said Rhys Morgan by the said Emma his wife should depart this life under the age of twenty-one years, or unmarried, &c., then Laurence should stand and be possessed of the moneys arising by any such sale or sales, and the accumulated interest and dividends thereof, upon trust for the executors, administrators, and assigns of the said Rhys Morgan, &c.: And the said Rhys Morgan, for himself, his heirs, executors, and administrators, did thereby covenant, grant, and declare with and to the said John Howard, his executors, administrators, and assigns, that the said John Howard, his executors, &c., should stand possessed of and interested in all and singular the said leasehold messuages, &c., thereinbefore described, and all other the leasehold here-

(a) The trusts as to the freehold became immaterial, it having been subsequently sold.

ditaments comprised in the said thereinbefore in part recited indenture of the 20th of March, 1837, upon the like trusts, and for the like intents and purposes as were thereinbefore declared of and concerning the said freehold hereditaments and premises which were thereby appointed and released unto and to the use of Laurence and his heirs.

There were no children of Rhys Morgan and Emma to take under this deed.

David Saunders died on the 22d of February, 1840.

Catherine Saunders, his widow, mortgaged the premises in question, *1042] by deed of the 18th of December, *1848, to Lewis Lewis, the defendant, for an advance of 550*l.*,—she having previously, viz. on the 30th of April, 1840, made a will bequeathing one moiety of her estate to her illegitimate son Llewellyn Jenkins, and the other moiety in trust for the maintenance of Rhys Morgan.

On the 31st of March, 1841, Rhys Morgan died, leaving his wife Emma him surviving, but no children.

On the 23d of May, 1841, Catherine Saunders died.

On the 29th of November, 1841, Emma, the widow of Rhys Morgan, married Thomas Richards, the lessor of the plaintiff.

Some time in the year 1841, Llewellyn Jenkins, the illegitimate son of Catherine Saunders, sold and conveyed all his interest under his mother to Lewis, for 100*l.*

On the 6th of January, 1849, by indenture between John Howard of the first part, Emma Richards (late widow of Rhys Morgan) of the second part, and Thomas Richards (her then husband) of the third part,—reciting the settlements of the 20th of March, and 4th of November, 1837, the deaths of David and Catherine Saunders, and the death of Rhys Morgan, leaving Emma surviving, but no issue, and that Rhys Morgan and Emma his wife had not exercised their joint power of appointment, nor had Emma, his widow, since his decease, and that she was then the wife of Thomas Richards, and was desirous of exercising her power under the deed of the 4th of November, 1837, and had requested Howard to join in vesting the legal estate in Thomas Richards,—she the said Emma Richards did direct and appoint Howard to assign the said leaseholds to Thomas Richards, and Howard did accordingly assign the same, to hold to Thomas Richards for the residue of the respective terms.

The interest sought to be recovered in the action of ejectment, was, the interest in the term granted to William Joseph and Rhys Morgan (the son of Catherine Saunders), by the lease of the 13th of September, 1822.

*1043] *It was proved that David and Catherine Saunders had been in the receipt of the rents and profits of the premises down to the time of David Saunders's death; and that Catherine Saunders had continued to receive them until some few months before her death.

On the part of the defendant, it was contended that the deed of the 20th of March, 1837, being a post-nuptial settlement, made without pecuniary consideration, was a voluntary deed, and void under the 27 Eliz. c. 4. And he relied upon the deed of the 26th of May, 1829, executed by Catherine Joseph (afterwards Saunders) a few days before her marriage with David Saunders. That deed was not produced: but Thomas, the attorney with whom it had been deposited, gave his recollection of its contents, and stated that Morgan Williams and John Bruce Pryce were the trustees named in it. Thomas stated that he was well acquainted with Catherine Joseph; that some time in 1829, she, accompanied by her son Rhys Morgan, came to his office at Swansea, and produced a deed which she said she had executed in favour of her son; that she left the deed with him, desiring him not to give it up to any one except herself and her son together; and that Catherine Joseph and Rhys Morgan came to him a few days before Catherine's death, and he gave back the deed to them.

A Mrs. Bowen proved, that, shortly before Catherine Joseph's marriage with Saunders, she accompanied her to the office of an attorney named Williams, at Swansea, and there saw her execute a deed, having two seals to it; and that Catherine Joseph then told her the purport of the instrument. This evidence was objected to, on the part of the plaintiff, and rejected.

It was proved that search had been made for this deed at Mrs. Saunders's, but no trace of it could be discovered.

The representative of Williams (who was dead) produced the draft of the deed, which had been found at his *office at Swansea, [*1044 and proved that it was in the handwriting of a person who was in the habit of drawing for Williams. This was objected to, and withdrawn in the ejectment case, and rejected by the learned judge in the action of detinue. He also produced Williams's bill-book, which contained an entry of charges for drawing, engrossing, and attending at the execution of such a deed, with a note in the handwriting of Williams, that the amount had been paid. This the learned judge admitted.

John Bruce Pryce, the surviving trustee named in the deed, who was also called, stated that he was entirely ignorant of the existence of such a deed.

On the part of the lessor of the plaintiff, it was submitted that it must be presumed that there was an attesting witness to the deed of the 26th of May, 1829, and that he ought to be called. The learned judge, however, overruled the objection, as there was no evidence that there was any attesting witness. It was further insisted that there was not sufficient evidence of proper search to justify the reception of secondary evidence of the contents of the deed, inasmuch as there was a trustee whose possession of it was not negatived.

It was then contended that the circumstances under which that deed

was originally executed, the absence of delivery, and the secret deposit of it with Thomas, clearly showed that it was never meant to operate as a deed: and, further, that it was void as being a fraud upon the marital rights of the intended husband.

A verdict was taken for the plaintiff in each case, with leave to the defendant to move to enter a nonsuit or a verdict for him.

Keating, accordingly, on a former day in this term, obtained a rule nisi in the ejectment case to enter a nonsuit or a verdict for the defendant; and, in the action of detinue, a rule to enter a nonsuit or a *1045] verdict for the *defendant, or a new trial, upon an affidavit of surprise,—that the circumstance of the deed of the 26th of May, 1829, having been executed, had only come to his knowledge a few days before the trial, and that the deponent (the defendant's attorney) was not aware who were the trustees named in that deed until the assizes had commenced, and consequently had no opportunity to ascertain what search would be necessary. *Burrel's case*, 6 Rep. 72, *Warburton v. Loveland*, 6 Bligh, N. S. 30, and *Hope v. Harman*, 11 Jurist, 1097, were referred to.

The court directed that both rules should be argued before they pronounced judgment in either case.

Alexander and John Gray now showed cause in *Doe d. Richards v. Lewis*.—The deed of the 26th of May, 1829, was a voluntary conveyance, and a fraud upon the marital rights of Saunders, the intended husband. The circumstances under which it was executed, the fact of Mrs. Saunders never having mentioned it to her husband, or to Pryce, the trustee, her keeping it under her own control, and her having continued to receive the rents of the premises down to a very short period before her death, are all pregnant to show that it never was meant by her to operate as a deed at all. There was no delivery, which is essential to the perfection of a deed. In *Hope v. Harman*, 11 Jurist, 1097, which will be relied on upon the other side,—where an instrument purporting to be a deed, was executed in the presence of an attesting witness, but had never been out of the presence of the grantor; and it was held, in an action against the executor of the grantor, that the jury might properly find that it was delivered,—there was a circumstance that is wanting here, viz. an execution of the deed in the *1046] *presence of *an attesting witness*. [JERVIS, C. J.—Manual delivery is not essential. In *Doe d. Garnons v. Knight*, 5 B. & C. 671 (E. C. L. R. vol. 11), 8 D. & R. 348, it was held, that, where a party to an instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential.]

In Sheppard's Touchstone, Vol. I. p. 58, it is said, that, "When an instrument is delivered to a stranger, and nothing is said at the time of delivery, no inference of intent arises merely from the act of delivery. But, if the delivery be to the party, this act raises the presumption that the instrument is to become the deed of the party." Here, all inference of intent to deliver this deed is expressly negatived by the evidence of what did actually take place. Then the deed was clearly fraudulent and void as against the husband, and against a subsequent purchaser for valuable consideration. The authorities upon this subject are considered in Powell on Mortgages, 5th edit. 719, note (O), where it is said:—"In *Howard v. Hooker*, 2 Rep. Ch. 81 (42), a widow, in contemplation of a second marriage, made a deed of her former husband's estate (to which she was entitled under a settlement thereof for her benefit), and married, without informing her second husband of the disposition she had made of her property. The husband filed a bill to have this deed set aside as a fraud upon him; and it was decreed that the deed should be absolutely set aside, and no use made of it either against the said second husband or any claiming under him. That a secret conveyance by a feme sole of her property to a stranger, on the eve *of marriage, without the knowledge of her intended husband, will be deemed a fraud, see *Lance v. Norman*, 2 Rep. Ch. 41 [*1047 (79, 2d edit.), *Blanchet v. Foster*, 2 Ves. sen. 264, *Cotten v. King*, 2 P. Wms. 358, *Poulson v. Wellington*, 2 P. Wms. 533, *Carleton v. The Earl of Dorset*, 2 Vern. 17, and *Ball v. Montgomery*, 2 Ves. jun. 191, 194, 4 Bro. C. C. 339. But, though, if a woman, on the eve of marriage, secretly convey her property, without the privity of her intended husband, it will be considered as a fraud; yet, in a case where the deed had been made in contemplation of a marriage with another person, and with the consent of that person, it was held to be unimpeachable: *Strathmore v. Bowes*, 2 Bro. C. C. 345.(a) The intended husband's interest in his wife's property before marriage, is founded upon the good faith which ought to subsist inviolable in relation to so solemn a contract as that of marriage. 'In strictness,' says Mr. Roper,(b) 'the husband can have no right to any of his wife's property previously to the solemnization of the marriage. Before marriage, therefore, the wife is at liberty to settle or dispose of her fortune as she pleases, provided it be done with no improper motive, nor to deceive the person who is then addressing her with a view to their union. But deception will be inferred, if, after the commencement of the treaty for marriage, the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence. The injury he would sustain, if such a transaction were to be sanctioned,

(a) Decree affirmed in the House of Lords, 3d March, 1789, 1 Ves. jun. 28: contra, *Edmonds v. Dennington*, mentioned in *Carleton v. The Earl of Dorset*, 2 Vern. 17.

(b) Roper, Bar. & Fem. 160. And see Bright on Husband and Wife, 221—229.

is obvious: for, since the wife's apparent fortune, in addition to his own, *1048] may be a weighty consideration *and inducement for entering into the contract, the happiness of both might be endangered, if, after the treaty began under such calculations and persuasions, the wife should be enabled, prior to the marriage, to disappoint them by disposing of or abridging her interest in the property that belonged to her. It is presumed, therefore, that, without the consent of the intended husband, the law will not permit any disposition of the wife's fortune to be made before the marriage then in contemplation; and that, under no circumstances, after a treaty for a marriage has commenced, will any such voluntary disposition of her property be binding upon her subsequent husband. In the absence of other instances of fraud, the time when the disposition or settlement was made must decide its validity; and attention to this circumstance will, as it is presumed, reconcile the principal cases.' In *The Countess of Strathmore v. Bowes*, Lord THURLOW expressed the rule in these words,—'A conveyance by a wife, whatsoever may be the circumstances, even a moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud. If a woman, during the course of a treaty of marriage with her, make, without notice to the intended husband, a conveyance of any part of her property, I should set it aside (though good *prima facie*), because affected with *that fraud*.'" [TALFOURD, J.—Do you find any case where this has been held to be an objection to a deed in a court of law?] None such has been found: but it is submitted, that, if this be a fraud, it may be urged as an objection in any court. [CRESSWELL, J.—The deed is not fraudulent at the moment of its execution. Suppose the marriage never takes place?] The deed would no doubt be good against the grantor.

The indenture of the 20th of March, 1837, is not a voluntary conveyance void by the 27 Eliz. c. 4, within *1049] the explanation of that statute given in *Burrel's case*, 6 Rep. 72. And, if it were, it may well be doubted whether the defendant, who claims as mortgagee, is a person who has a right to avail himself of that defect: see *Parker v. Carter*, 4 Hare, 409.

Keating and *Phipson*, contra, were not required to support the rule.

Chilton and *Pulling* showed cause against the rule in the action of detinue.—The grounds upon which this rule was moved, were,—first, that the declarations of Mrs. Saunders were improperly rejected,—secondly, that secondary evidence of the contents of the deed of the 26th of May, 1829, was improperly excluded,—thirdly, that the settlement of the 26th of March, 1837, was avoided by the mortgage by Mrs. Saunders to the defendant, of the 18th of December, 1840.

1. The declarations by Mrs. Saunders before her marriage to Saunders, in the interval between the concoction of the deed and its execution, were properly rejected. [WILLIAMS, J.—I ruled, that, what

Mrs. Saunders said to Mrs. Bowen, as to her going to Swarsea to execute the deed, was not admissible; not that, if the deed had been proved to exist, her declarations would not have been admissible to prove its contents.]

2. The search proved was clearly insufficient to let in secondary evidence of the contents of the deed of the 26th of May, 1829. The supposed deed purported to convey the property in question to two trustees,—Morgan Williams and John Bruce Pryce. They were the persons who were entitled to the custody of the deed: it was necessary, therefore, to show that due search and inquiry had been made of them. One of them, Pryce, was called; he stated that he had never seen or heard of such a deed: *but the other, Morgan Williams, there was no account of; no search in his depositories was proved. [*1050 [TALFOURD, J.—That defect was supplied in the ejectment.] It was. If it is to be assumed that the transaction was a *bond fide* one, the deed must be supposed to have found its way to the proper custody. In *Cruise v. Clancy*, 6 Irish Equity Rep. 552, by a marriage settlement, lands were limited to E. B. (the settlor) for life, remainder to trustees for a term of years, to secure a jointure and younger children's portions, remainder to the sons of E. B. in tail, remainder to the heirs of E. B. The estate descended to the heirs of E. B., all the prior limitations being spent. On a bill filed by the representatives of the surviving younger child, an alleged copy of the settlement was produced, and an ineffectual search proved among her papers for the original, and that the copy was found there; a witness believed that part of the document was in the handwriting of one W. B., who was clerk to his father, the solicitor in the cause, and had died twenty years before; he had never seen W. B. write, but believed the writing to be his, by comparison, and also an endorsement, "compared, W. B.," but did not know when it had been made. The original deed was registered, and the memorial of it was proved. It was held, that the copy was not admissible in evidence, no search having been made among the papers of the trustees of the term, or of the inheritor, and the handwriting of W. B. not having been sufficiently proved: though, *semble*, that, if the endorsement had been proved to have been in the handwriting of W. B., and to have been made at the time it purported to have been made, and the document had been transmitted with the title-deeds, and acted on, it would have been admissible.

The deed was clearly void in its inception. It was secretly made just on the eve, and evidently in contemplation, of the grantor's marriage, in fraud of the intended *husband. It was never delivered: Mrs. Saunders did not for a moment part with the control over it, even while it was deposited with Thomas; and in this respect there is a remarkable contrast between this case and *Doe d. Garnons v. Knight*, 5 B. & C. 671 (E. C. L. R. vol. 11), 8 D. & R. 348 [*1051

(E. C. L. R. vol. 16). [JERVIS, C. J., referred to the notes to Twyne's case, 3 Co. Rep. 80, in Smith's Leading Cases, p. 13 c, where it is said,— "A mortgagee is a *purchaser* within the meaning of the 27 Eliz. c. 4: Chapman v. Emery, Cowp. 278.(a) And so is a lessee at a rack-rent, Goodright v. Moses, 2 W. Bla. 1019; or a person who releases a contested right, in consideration of the conveyance to him, Hill v. The Bishop of Exeter, 2 Taunt. 69; or the purchaser under a settlement made in consideration of an intended marriage, Douglass v. Waad, 1 Cases in Ch. 99; but not under a post-nuptial settlement, unless made in pursuance of articles entered into before marriage, Martin v. Seamore, 1 Cases in Ch. 170, for, one voluntary conveyance cannot defeat another, Clavering v. Clavering, 2 Vern. 473, 1 Abr. Eq. 24."] According to the *dictum* of PARKE, B., in Bowker v. Burdekin, 11 M. & W. 128, 147,† in considering whether a deed has been delivered as a deed, or as an escrow, "you are to look at all the facts attending the execution,—to all that took place at the time, and to the result of the transaction." [JERVIS, C. J.—All that is matter for a jury; but from that you are precluded by the judge's note.] If the court find that the deed is clearly a bad one, they will not grant a new trial. In The Countess of Strathmore v. Bowes, 2 Brown's C. C. 345, BULLER, J., says: "No question it is fraudulent, if the wife holds out that *1052] there is no settlement, even although *it be in favour of a child." So, in Howard v. Hooker, 2 Rep. Chan. (81) 42, in Draper's case, 2 Freem. 29, and in England v. Downs, 2 Beavan, 522, a deed of this sort was held not to be available against the husband. [WILLIAMS, J.—All these are cases in equity.] They are: but, in Vin. Abr. *Voluntary Conveyance* (C), pl. 3, it is laid down as a general proposition of law, that such conveyances are void. It has been said by Lord MANSFIELD, that, "the principles of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statute 13 Eliz. c. 5, and 27 Eliz. c. 4. The former of these statutes relates to *creditors* only; the latter to *purchasers*. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud:" Cadogan v. Kennett, Cowp. 432.(b) [WILLIAMS, J.—It is difficult to reconcile the language of Lord MANSFIELD in that case with the 27 Eliz. c. 4.] In Thomas v. Brennan, 15 Law Journ. N. S., Chan. 420, by an indenture made in contemplation of marriage, certain leasehold property belonging to the intended wife was conveyed to trustees on certain trusts; and the trusts of a sum of stock, also belonging to the intended wife, which had been transferred into the names of the trustees, were declared. The marriage did not take effect, and, soon after the date of the indenture, the lady married another

(a) As to an equitable mortgage, see Buckle v. Mitchell, 18 Ves. 100, Lister v. Turner, 5 Har. 281, Kerrison v. Dorrien, 9 Bing. 76 (E. C. L. R. vol. 23), 2 M. & Scott, 114 (E. C. L. R. vol. 25).

(b) See 1 Smith's Leading Cases, 12.

person. In a suit instituted by the husband and wife against the trustees, it was ordered that the leasehold property should be conveyed to the husband, and the stock transferred into his name.

Rhys Morgan took under the deed of the 26th of May, 1829, a *quasi* equitable estate-tail, which he could have conveyed: and he was a conveying party to the indenture *of the 20th of March, 1837. [*1053 Assuming, therefore, that the former deed had any operation, it is barred by the latter.

Saunders and wife might at any time have got rid of the deed of the 26th of May, 1829, by a conveyance to a purchaser for value: *Scot v. Bell*, 2 Levinz, 70; *Fitzmaurice v. Saddler*, 9 Irish Equity Rep. 595.

Keating, *W. R. Grove*, and *Phipson*, in support of the rule, were desired by the court to confine their attention to the question as to the admissibility of secondary evidence of the contents of the deed of the 26th of May, 1828.—There was ample evidence of search for the missing deed, to justify the learned judge in admitting secondary evidence of its contents. It was proved that all legitimate places of deposit had been searched and exhausted, except the receptacles of the deceased trustee, Morgan Williams. The deed was deposited by Mrs. Saunders and Rhys Morgan with Thomas, who had it in his possession about eleven years, and then, a few months only before her death, and after the death of David Saunders, returned it to her in the presence of Rhys Morgan. Satisfactory evidence was given of a search for it at Mrs. Saunders's house, and also at the house of Rhys Morgan. And it was proved by the surviving trustee that the deed had never been in *his* possession. [TALFOURD, J.—Are you not bound to exhaust all possible places?] There is no rule of law which peremptorily requires search to be made amongst the papers of every person who is in any way party to the deed. It is much the same principle as that which prevails in cases of notice to produce: where a document is last seen in the possession of a party, a notice to him to produce it, is sufficient. All that is necessary, is, to show that *reasonable diligence has been used: *Gully v. The Bishop of Exeter*, 4 Bing. 290, 292 [*1054 (E. C. L. R. vols. 13, 15), 12 J. B. Moore, 591, 593 (E. C. L. R. vol. 22). In *The King v. The Inhabitants of Morton*, 4 M. & Selw. 48, in order to establish a settlement by apprenticeship, it was proved that the indenture was only of one part, and that, upon application to the pauper, who was then ill, and died soon afterwards, to know what had become of it, he declared, that, when the indenture expired, it was given to him, and he burnt it long since; and it was also proved that inquiry was made of the executrix of the master, who said that she knew nothing about it: and it was held that this proof was sufficient to let in parol evidence of the contents of the indenture. So, in *The King v. The Inhabitants of Piddlehinton*, 3 B. & Ad. 460 (E. C. L. R. vol. 23), the master of an apprentice having had the indenture in

his possession, failed in business, and an attorney took the management of his affairs, and custody of his papers, which he inspected, but did not find the indenture; and it was held that this, after the master's death, was a sufficient case to let in secondary evidence of the indenture, though his widow was living, and no inquiry had been made of her respecting it. [WILLIAMS, J.—Mr. Taylor, speaking of *The King v. Morton*, says:(a) “The decision in that case appears to have proceeded on the somewhat ambiguous ground, that, if the statement of the apprentice was inadmissible, the indenture was not traced into his hands, and, being *functus officio*, there was no particular reason why it should be in his custody; while, if the statement could be received so as to show a possession of the deed by him, it showed also that further search or inquiry was unnecessary.”(b)]

*1055] The only remaining question is, whether the mortgage *by Mrs. Saunders of the 18th of December, 1840, was good as against the voluntary conveyance of the 20th of March, 1837. There is no question that a mortgagee is a purchaser for valuable consideration. The difficulty presented here is, whether the husband may not reduce the chattel real of his wife into possession by a voluntary conveyance. That expression, however, is not applicable to the case of chattels real. The husband, by the marriage, acquires a species of joint-tenancy with the wife, which survives to her on his death, unless he has parted with it for such a consideration as will make the party taking a purchaser. In *Burrel's case*, 6 Co. Rep. 72, where the grandfather made leases to the father, who assigned them to trustees for his son, an infant, and with a colourable intent to pay debts; and the grandfather within a short time died, and the father entered and acted as owner, and neither the assignees nor the infant took any profit or paid any debts, and then the father sold the fee, and covenanted that the lands should be clear of all leases,—it was held, that the leases assigned in trust for the son, although created by the grandfather, were void against a purchaser from the father: and Lord COKE says that it was resolved, “that, if the father makes a lease by fraud and covin of his land, to defraud others to whom he shall demise or sell it (as all fraudulent leases should be so intended), and before the father sells or demises it he dies; and the son knowing, or not knowing, of the said lease, sells the land on good consideration: in that case, the vendee shall avoid that lease by the said act:(c) for, inasmuch as it is intended and presumed in law that every fraudulent lease is made to the intent generally to defraud purchasers, farmers, &c., within this generality every particular purchaser, farmer, &c., is included: and

(a) 1 Taylor on Evidence, 305.

(b) Per Lord ELLENBOROUGH, 4 M. & Selw. 50, explained by BAYLEY, J., in *The King v. The Inhabitants of Denio*, 7 B. & C. 620 (E. C. L. R. vol. 14), 1 M. & R. 294 (E. C. L. R. vol. 17).

(c) 27 Eliz. c. 4.

the said act is very well penned, for, the words of the act *are general; and it is not necessary that he who sells the land [*1056 should make the former fraudulent estate or incumbrance; but, be the estate, &c., fraudulent *ut supra*, whosoever sells (makes) it, the purchaser shall avoid such fraudulent estate, &c.; and therefore, in the case at bar, the said leases being on the evidence thought fraudulent, the vendee of the father and heir shall avoid them." There is a *dictum* of Sir J. WIGRAM, V. C., in *Parker v. Carter*, 4 Hare, 409, 410, somewhat against Burrel's case; but the House of Lords upheld it in *Warburton v. Loveland*, 6 Bligh, N. S. 30. [JERVIS, C. J.—In Burrel's case, the son only completed a sale which had been contemplated by the father. *Alexander*.—The 12th edition of Sugden's *Vendors & Purchasers* omits the passage approbatory of Burrel's case, which some of the earlier editions contained.(a)] The propriety of Burrel's case was never doubted before.

JERVIS, C. J.—It was thought convenient that both these rules should be argued before we gave our judgment; but the arguments in the two cases have raised totally distinct questions.

My Brother CRESSWELL, who has been obliged to leave the court, has desired me to express his entire concurrence in the judgment we are about to pronounce.

It will be more convenient in the first place to dispose of the case of *Doe d. Richards v. Lewis*, because we may then dispose of the deed of May the 26th, 1829, without embarrassing ourselves with the construction of the settlement of the 20th of March, 1837.

The facts are shortly these:—Catherine Joseph, on the 26th of May, 1829, being then about to marry David Saunders, executed a deed, which it must be assumed that she intended to take effect, whereby she conveyed the leaseholds in question to trustees, in trust for herself for *life, remainder to Rhys Morgan, her son by a former husband, [*1057 and his issue, and, in default of issue of Rhys Morgan, remainder to her illegitimate son, Llewellyn Jenkins. We must take it, therefore, that, when Catherine Joseph married Saunders in 1829, she had a life-estate only in the property. It seems to have been decided, in *Douglasse v. Waad*, 1 Cases in Chancery, 99, that an ante-nuptial settlement avoids a former voluntary deed. But there is no case which establishes that the husband acquiring an estate merely by marriage, takes as a purchaser within the meaning of the statute. In truth, he takes it at a moment when he has parted with the opportunity of becoming a purchaser. It was ingeniously argued by Mr. *Pulling*, that the deed of the 26th of May, 1829, conferred on Rhys Morgan a *quasi* estate-tail, which was effectually barred by the settlement of the 20th of March, 1837: but it must be remembered that the legal estate was then outstanding in the trustees under the former deed. The whole

(a) See 10th edit. p. 926; 11th edit. Vol. III. p. 283.

effect of the deed was, to give Mrs. Saunders a life-estate. When, therefore, she mortgaged to Lewis in 1840, she could only be dealing with what she herself had: the outstanding estate was in Llewellyn Jenkins. Consequently, the defendant, who claims under the mortgage and also under a conveyance from Llewellyn Jenkins, had established his title, and is entitled to have the rule for entering a nonsuit in the ejectment made absolute.

With regard to the action of detinue, all we have to do with the deed of the 26th of May, 1829, is, to see if sufficient search was proved, to justify the reception of secondary evidence of its contents. It seems to me that there was not. Whether or not proper search has been made must of course depend upon the circumstances of each particular case. Mrs. Saunders wished to conceal *from her husband the *1058] fact of her having executed the deed. Accordingly she, accompanied by her son, went to Swansea, and there deposited it with Thomas, with directions to give it up only to herself and Rhys Morgan. After the death of her husband,—the deed having then been about eleven years in Thomas's custody,—Mrs. Saunders and Rhys Morgan went to Thomas, and obtained the deed from him. What was the proper course for her to take with respect to it? It was her duty and her interest, as well as the interest of her son, that the deed should be placed in the hands of the trustees. After Mrs. Saunders's death, search was made for it amongst her papers, and it was not found. Are we justified in assuming that she destroyed it? I see no reason why we should infer that. The proper place for it to be, was, the repositories of one of the trustees; and there was no sufficient evidence of search there.

Another ground put forward on the part of the defendant, for a new trial, was, that certain declarations alleged to have been made by Mr. Saunders, were rejected. It is somewhat inconvenient that the defendant's counsel at the trial did not point out the precise purpose for which that piece of evidence was offered. It was not to prove the contents of the deed. The object was, to show that Mrs. Saunders had done an act. It is open to considerable doubt, whether, if she had made an express declaration to the effect that she had executed a deed giving a life-interest to herself, with remainder to her son Rhys Morgan, it would have been admissible: so far from cutting down her estate, it would have been somewhat enlarging it as against her husband. It seems to me that these declarations were properly rejected.

How, then, stands the case upon the evidence? It is contended, on behalf of the defendant, that, even if the deed of the 26th of May, 1829, cannot be relied on, the mortgage of the 18th of December, 1840, defeats the *settlement made by David and Catherine *1059] Saunders on the 20th of March, 1837. I apprehend, however, that is not so. Burrel's case has been misunderstood; and, even if

pushed to the utmost, it would not affect this case. Under the circumstances, David Saunders, by the marriage, got the absolute estate. He doing nothing, on his death, she would resume possession. The question then arises whether the deed of the 20th of March, 1837, operated to destroy the estate which before subsisted in the husband and wife. Was he doing an act which defeated the right of his wife? He did an act which, as between the husband and wife, had the effect of completely altering the wife's right of survivorship. She gets the estate for life only, qualified with a remainder to Rhys Morgan. It is clear he intended to effect a complete alteration of the estate. But it is said that that being a voluntary deed, cannot affect the wife, or one claiming under a purchase from her: and Burrel's case is relied on. It must, however, be remembered, that, when Burrel's case was decided, the courts had not determined that mere voluntariness was a badge of fraud. At the end of the report, Lord COKE adds:—"I acquainted POPHAM, C. J., with this resolution, and he allowed well of it, and said it was well done to construe the act in suppression of fraud; and (as he told me) it was adjudged before him and his companions, justices of the King's Bench, that, where a man in a secret manner made an estate to the use of his wife for her jointure, by fraud and covin, to defraud a purchaser to whom he intended to sell the land, that, in such case, if the fraud be proved in evidence or confessed in pleading, the purchaser should avoid the estate." It is plain, therefore, that the resolution in Burrel's case applied to fraud *in fact*, and not, as is now suggested, to the mere case of a voluntary conveyance. Sir Edward Sugden, when he cites the case, sets out the facts.^(a) *There is that broad distinction between Burrel's case and the case [*1060 now under consideration. It seems to me, therefore, that this was an act well done by the husband to alter the character of the estate. The wife took nothing and could have nothing more than a life-estate. On that ground, therefore, I think the defendant is not entitled to succeed. But, inasmuch as he may have been taken by surprise with regard to the former deed, I think he ought to be allowed to go down again, upon payment of costs.

The rule in the ejectment case will be made absolute to enter a non-suit; and, in the action of detinue, it will be absolute for a new trial, on payment of costs.

WILLIAMS, J.—I am of the same opinion. In *Doe d. Richards v. Lewis*, the deed of the 26th of May, 1829, was established in evidence, and must be taken to have been an operative deed. It is unnecessary to make any further remarks upon that deed, except as to the proposition which has been attempted to be established before us, that that deed was a fraud upon the marital rights of the intended husband, and therefore void. It was never proposed to treat it as a question of fraud.

(a) *Vendors and Purchasers*, 10th edit. Vol. III. p. 382.

in point of fact, to be disposed of by the jury: it was only contended that it was voluntary. It is unnecessary to give any opinion as to whether the deed would have been bad, if the jury had found that it was intended as a fraud upon the husband.

As to *Richards v. Lewis*, I am of opinion that no sufficient evidence was given, that all proper repositories had been searched, to justify the defendant in calling upon the judge to receive secondary evidence of the deed of the 26th of May, 1829. It was by no means improbable that the deed should be found in the place in which it ought to have been if Mrs. Saunders had done her duty, viz. in the custody of the trustees, who are appointed for the express purpose of protecting the
*1061] rights *of parties taking under the instrument. I think the proper means of finding the deed were not duly exhausted.

As to the rejection of evidence,—Mr. *Grove* contended at the trial, in the widest possible way, that the declarations of Mrs. Saunders were admissible. No doubt, I, in general terms, negatived that general proposition. If the point had been fairly submitted, and argued upon the ground now suggested by Mr. *Grove*, I should have rejected the evidence. It is very difficult to apply the principle contended for to one who is shown to be about to benefit herself and her son, by diminishing her husband's interest. These, therefore, are not declarations by a person standing in so disinterested a position as to make them admissible.

As to the mortgage,—Burrel's case is an authority to show that a deed which is made in contemplation of actual fraud, may be treated as a nullity as against a purchaser. Assuming that case to be good law, it is not applicable to a case where the fraud is not actual, but constructive only. I incline to think the view taken by Vice-Chancellor WIGRAM, in *Parker v. Carter*, 4 Hare, 409, is the correct one, viz. that a deed cannot be set aside merely on the ground of its being voluntary. The consequence of holding a contrary doctrine would be, that, if a father, to the disherison of his heir, made a gift with intent that it should operate in favour of younger children, the heir would have power to nullify all that is done, and to sell the estate, and put the money in his own pocket. I should pause long before I consented to a doctrine which was to have such a result.

Upon the whole, I concur with the Lord Chief Justice in thinking that the utmost we can do for the defendant in this case, is, to make the rule absolute for a new trial, upon payment of costs.

*1062] *TALFOURD, J.—I am of the same opinion upon all the points. In the case of *Doe d. Richards v. Lewis*, which was tried before me, the effect of the deed of the 26th of May, 1829, was, by consent, reserved for the opinion of the court. The main point relied on by the defendant's counsel, was, that that deed never was intended to be operative at all, but was a mere sham. Looking at the whole of the evidence,

however, I concur with the rest of the court in thinking that it was meant to operate as a valid deed.

As to the sufficiency of the search, to let in secondary evidence of the deed, it is only necessary for me to say that I entirely concur in what has fallen from my Lord and my Brother WILLIAMS upon that subject. A search can never be held sufficient, unless you negative the possession of the deed by the party in whose custody it would legally and properly be found.

Doe d. Richards *v.* Lewis,—rule absolute to enter a nonsuit.

Richards *v.* Lewis,—rule absolute for a new trial, on payment of costs.

END OF E. LABY TERM.

ADDENDA.



NOTE A.—vide 10 C. B. 452 (E. C. L. R. vol. 70).

The writ of *elegit*, given by stat. Westminster 2, c. 18, empowers the sheriff to deliver to the judgment-creditor all the chattels of the debtor, with certain exceptions, and one-half of the land, until the debt be levied. Under this process, no chattels could be taken but those of which the debtor was possessed at the time the *elegit* was awarded and issued. But, although the statute uses the same general terms, with reference to both species of property, the construction in respect to them has been different; and the courts have granted process against all the land of which the debtor was seised on the day upon which the judgment was obtained, or at any time since. Few persons, and those only such as have slept upon their rights, are benefited by this diversity of construction; whilst every person interested in the transfer of land, is injured by the uncertainty and insecurity thrown upon all titles.

At the breaking out of the civil war in the seventeenth century, reliefs, marriages, and other feudal *redevances*, which formed so important a part of the revenues of the crown, fell with the monarchy; and, upon the restoration, the landed interest was relieved from these burdens, the excise, which had been introduced, for other purposes, by the parliamentary party, being settled upon the sovereign instead. It may, however, be doubted whether a greater number of years' purchase was added to the value of land by thus shifting the burthens of the state from the shoulders of the producers to those of the consumers, than had been taken away by the arbitrary construction put upon this branch of the statute of Edward.

There is this important difference between the two cases,—the arrangement upon the restoration relieved the landed interest at the expense of those who had to pay the excise; whereas, the lien of judgments lessens the saleable value of every acre of freehold land in England, with no corresponding benefit to any interest.

The 1 & 2 Vict. c. 110, increased the evil, in two ways. It gave the oppressive privilege of judgment-debts to demands which formerly could not have formed any impediment to the transfer of lands; and it shook all titles to copyhold and customary interests, by bringing them also within the operation of a retrospective *elegit*.

The greatest relief to the landed interest would probably be, an enactment that no future judgment should bind lands alienated before the delivery of the writ to the sheriff, except, *perhaps*, in the case of express personal notice of the judgment.

NOTE C.—10 C. B. 72 (E. C. L. R. vol. 70).

A. sues B. for 10*l.*, the price of goods sold and delivered, and proves that the goods were obtained by fraud. The judge is about to order the commitment of B.; upon *which A. says,—“Although the commitment is *in pœnam*, and not in satisfaction, yet B. will avoid going to prison if he pays the debt and costs. [*1064 I know he cannot pay now: but he is earning 2*l.* a week, and is well able to discharge the debt by a payment of 2*l.* per month.” The judge tells A. that he can have either an order for the payment of 2*l.* per month, or an immediate order for com-

mitment; but that, since the case of *Abley v. Dale*, 10 C. B. 62 (E. C. L. R. vol. 70), an order for commitment, defeasible upon the payment of the debt by instalments, cannot safely be made; and that, if A. takes an order for payment by instalments, he must condone the fraud, and that, in the event of these instalments not being paid, he must incur the expense and delay of a judgment summons, with the chance of being turned round upon his failing to disprove the assertion of inability to pay, which the fraudulent debtor is sure to make.

In *Kinning, ex parte*, 4 C. B. 507 (E. C. L. R. vol. 56), the debtor was committed for an offence in respect of which he had not been heard; for although it had been adjudged that he was of sufficient ability at the time of the hearing, he was not ordered *then* to pay. His only default was, in not paying at the deferred period, his ability to do which was not a necessary consequence of his ability to pay which had existed at the time of hearing. In *Abley v. Dale*, the commitment was in respect of non-payment on a day upon which the party had been ordered to pay, and was of ability to pay,—an offence placed by the legislature on the same footing as the fraud adverted to above. The case of *Abley v. Dale* has imposed on the judge the necessity of making an immediate order for commitment, however much such a course may militate against the interests and the wishes of both creditor and debtor. The only palliative seems to be, to direct that the warrant of commitment shall not issue before a certain day; after which, notwithstanding any alteration of the circumstances of the debtor in the mean time, and without any inquiry into his actual circumstances, the warrant may issue; and that, it seems, with the sanction of the superior courts.

As the creditor who has obtained an order for an immediate commitment, may exercise his own discretion as to the time of applying for a warrant, the practical effect of the case of *Abley v. Dale*, is, to transfer the discretion of qualifying the sentence, from the judge to the creditor.

The observation referred to by Mr. Justice *Fortescue*, appears to be equalled, if not surpassed, by a charge made by a late Baron of the Exchequer in a case of murder, in which the learned judge is stated to have implored the jury to give to the prisoner the benefit of any doubt, as they hoped, upon rendering their *final account*, to have the benefit of any *doubt* which might arise in their own cases.

INDEX

TO THE

REGISTRATION APPEALS.

-
- I. *Cases decided upon Statutes anterior to the REFORM ACT, 2 W. 4, c. 45.*
 - II. *Cases decided upon the Construction of the REFORM ACT, 2 W. 4, c. 45.*
 - III. *Practice and Course of Proceedings upon Registration Appeals.*
 - IV. *Particular Points.*
-

I. Cases decided upon Statutes anterior to the REFORM ACT, 2 W. 4, c. 45.

8 H. 6, c. 7.—*Charge upon Land.*

1. *Shares in Building Society.*—An allottee of three shares in a building society, in October, 1850, purchased freehold land, of the value of 6*l.* per annum. The amount of the purchase-money and expenses (84*l.* 14*s.*) was advanced to him by the society upon mortgage of the land so purchased.

By the rules of the society each member was required to pay 1*s.* 6*d.* weekly for each share, and to execute to the trustees a mortgage to secure to them the sum in which the member may be indebted to the society, "with a premium for prior advance equal to 5*l.* per cent. per annum upon the amount advanced until repaid, and such sum, not exceeding 2*s.* 6*d.* per share per annum, for incidental expenses, as the committee should think fit,"—such mortgage reserving to the trustees a power of sale, in case the member should fail for twenty-six weekly meetings to pay, observe, and perform all or any of the subscriptions, payments, covenants, agreements, and regulations on his part to be paid, observed, &c.

No default had been made in the payment of the contributions required by the rules; and the mortgagor had always been, and still remained, in actual possession of the property. The amount of principal money due to the society on the 30th of January, 1851, was 47*l.* 10*s.* 3*d.*

The weekly contributions of 1*s.* 6*d.* per share (amounting to 11*l.* 14*s.* per annum) were appropriated by the society thus,—8*l.*

18*s.* in part liquidation of the principal mortgage debt, 2*l.* 10*s.* for premium or interest, and 6*s.* for incidental expenses:—

Held, that these contributions constituted a "charge" upon the land, within the meaning of the statute 8 H. 6, c. 7, and consequently that the mortgagor was not possessed of an estate "of the clear yearly value of 40*s.* at the least, above all charges." *Beamish, app., The overseers of Stoke, resp.*,
29

2. *Dissenting Minister.*—The minister of a dissenting congregation whose appointment, according to his own statement, was "general, and for life," occupied, by permission of the trustees, in whom the legal estate was vested, without paying any rent, a cottage and premises worth more than 40*s.* per annum. The revising barrister, considering that it was established, in point of fact, that the minister held the office and occupied the house and premises under the trusts of the deed, and therefore had such a freehold interest therein as entitled him to vote, retained his name on the list of voters:—Held, that he had come to a right conclusion. *Burton, app., Brooks, resp.*,
41

22 G. 3, c. 41, s. 1.—*Officer of Customs.*

3. An extra or glut tide-waiter,—one who is appointed by the collector of customs, and liable to be called upon to act as a tide-waiter whenever there may be occasion for his services, and who is paid by the job,—is an officer or person "concerned or employed in the charging, collecting, levying, or managing the customs," within the 22 G. 3, c. 41, s. 1,

and consequently disqualified as a voter.
Pownall, app., Hood, resp., 1

II. Cases decided upon the Construction of the REFORM ACT, 2 W. 4, c. 45.

Section 27.—Sufficiency of Qualification.

1. *Building.*—A. occupied under one landlord, at the yearly rent of 10*l.*, “a stable, with a hay-loft over, built of brick, annexed to which, but of a lower elevation, was another brick building, to which again was annexed an irregular wooden building divided into three compartments.” The whole were in the exclusive occupation of A., and were used by him for the purpose of his business of a wheelwright; but the access to each was by a door opening into a yard, also in A.’s exclusive occupation, there being no internal communication, except between two of the compartments of the wooden building:—Held, that the premises constituted “a building” within the 2 W. 4, c. 45, s. 27. *Pownall, app., Dawson, resp.,* 9

Section 32.—Freemen Voters.

2. *Qualification.*—A., a freeman of the borough of Shrewsbury paying scot and lot, for upwards of two years last past, and down to the 25th of March, 1851, occupied and resided in a house on the Wyle Cop, within the ancient and present limits of the borough, and, since the 25th of March, down to and on the 31st of July, occupied and resided in a house at Coton Hill, without the ancient but within the present limits of the borough. The revising barrister, holding him to be disqualified by the 2 W. 4, c. 45, s. 32, expunged his name from the list of freemen voters:—The court, without hearing any argument (the counsel for the respondent admitting that he could not support it), reversed the decision. *Jarvis, app., Peete, resp.,* 15

Section 40.—Amendment at the Revision.

3. *Notice of Claim.*—Where there is an inaccuracy in the description of the qualification in a notice of claim to be inserted in a list of borough voters, the proper course for the revising barrister, is, not to amend the claim (under the 6 & 7 Vict. c. 18, s. 40), but to treat the notice as sufficient, provided the mistake or misdescription is such as would have been amendable if in a list of voters. *Eaden, app., Cooper, resp.,* 18

III. Practice and Course of Proceedings upon Registration Appeals.

1. *Delivery of Paper Books.*—The court refused to hear an appeal (or to allow it to stand over), where the appellant had failed, on the respondent’s default, to deliver copies of the case to the two junior puisne judges. *Sheddon, app., Butt, resp.,* 27

2. *Hearing Appeals.*—The court will not reverse the decision of the revising barrister, without hearing the appellant’s counsel, although the respondent does not appear to support it. *Pownall, app., Hood, resp.,* 1

3. A., a freeman of the borough of Shrewsbury paying scot and lot, for upwards of two years last past, and down to the 25th of March, 1851, occupied and resided in a house on the Wyle Cop, within the ancient and present limits of the borough, and, since the 25th of March, down to and on the 31st of July, occupied and resided in a house at Coton Hill, without the ancient but within the present limits of the borough. The revising barrister, holding him to be disqualified by the 2 W. 4, c. 45, s. 32, expunged his name from the list of freemen voters:—The court, without hearing any argument (the counsel for the respondent admitting that he could not support it), reversed the decision. *Jarvis, app., Peete, resp.,* 15

4. Where the case transmitted to the master under the 6 & 7 Vict. c. 18, ss. 42, 64, is not signed, as well as endorsed, by the revising barrister, the court will not hear the appeal, unless the respondent consents to the case being remitted to him for signature. *Burton, app., Brooks, resp.,* 41

5. Where the case transmitted to the master under the 6 & 7 Vict. c. 18, ss. 42, 64, is not signed, as well as endorsed, by the revising barrister, the court will not hear the appeal, where the respondent does not appear. *Burton, app., Blake, resp.,* 47

6. *Postponing Hearing.*—The court adjourned the hearing of an appeal, in order to give the appellant time to give the notice required by the statute 6 & 7 Vict. c. 18, ss. 42, 64,—the case not having been settled and delivered to the appellant until the eighth day of term. *Burton, app., Blake, resp.,* 47

IV. Particular Points.

Amendment of claim	18
Building	9
Building society	29
Case, delivery of	41, 47
Charge on land	29
Costs	46
Customs officer	1
Dissenting minister	41
Glut tide-waiter	1
Hearing	1, 15, 27, 41, 47
Endorsing case	41, 47
Internal communication	9
Paper-books	27
Qualification of voter	15
Scot and lot voter	15
Signing case	41, 47
Stable	9
Tide-waiter	1

INDEX

TO

THE PRINCIPAL MATTERS.

ABODE.

See DWELLING.

ABSTRACT OF TITLE.

See EVIDENCE, I.

VENDORS AND PURCHASERS.

ACT OF UNION.

See QUARE IMPEDIT.

ACTION.

Notice of—See COUNTY COURT, VII.

ADMIRALTY, COMMISSIONERS OF.

- 1 *Actions against.*]—By the 9th section of the 1 & 2 G. 4, c. 93, the principal officers and commissioners of the navy for the time being were empowered to bring and maintain any action of ejectment or other proceeding for recovering possession of lands, &c., vested in them, and to bring, maintain, or defend any other action in respect of the said lands, &c.; and it was enacted, that, in any such action, they should be called by the name of "the principal officers and commissioners of His Majesty's navy," without naming any of them; and that such action or suit should not abate by the death, resignation, or removal of such commissioners, or any of them. By subsequent statutes, the powers and authorities of those commissioners were transferred to and vested in "the commissioners for executing the office of Lord High Admiral of the United Kingdom." A writ of summons, ad-

dressed to "the commissioners &c. executing the office of Lord High Admiral of the United Kingdom," requiring them to appear in an action of debt at the suit of the plaintiff, was served upon A., one of the commissioners, and upon no one else. Upon a motion, on behalf of A., to set aside the writ, and the copy and service thereof, for irregularity, the affidavits disclosed that the action was brought to recover arrears of half-pay alleged to be due to the plaintiff:—Held, that it was not competent to the court, in dealing with such a motion, to enter into the consideration of whether the action was maintainable or not; for, that, inasmuch as the statute 1 & 2 G. 4, c. 93, s. 9, enabled some actions to be brought against the commissioners by the description contained in this writ, there was no irregularity in the process itself; and, to determine, upon a summary application, that the cause of action was not within the statute, would be to deprive the plaintiff of his right to review their decision by writ of error. *Williams v. The Commissioners of the Admiralty*,
420

2. *Service of Process on.*]—The commissioners of the treasury are not a corporation: *semble*, therefore, that the proper mode of serving them with process would be by delivering a copy to each of them. *Id.*

ADMISSIONS.

See EVIDENCE, I.

ADVOWSON.

See QUARE IMPEDIT.

(1067)

AFFIDAVITS.

Intituling.

Upon a motion for an attachment, the affidavits are properly intituled in the original cause.

Masters v. Lowther,

948

And see EVIDENCE, I.

ANNUITY.

Condition against charging.

Testator bequeathed an annuity to his son A., payable quarterly, charging it upon his personal estate only, which, subject to the annuity, he bequeathed to his son B., whom he appointed his executor. The will proceeded,—"And I declare that the receipt of my said son A., signed with his own hand after each of the said quarterly payments shall have become due, shall be the only discharge which my executor shall be bound to accept, for each of such payments, and that it shall be lawful for my executor to require that my said son A. shall attend at the Town-Hall in Nottingham, to receive and give receipts for the said annuity, and to suspend the payment thereof until such requisition shall be complied with, from time to time, as my executor shall think proper:"—Held, that, assuming the condition to be a valid one, there was nothing to prevent A. from assigning the annuity to a third person. *Arden v. Goodacre,*

883

APPEAL.

From County Court—See COUNTY COURT, IV.

ARBITRAMENT.

Enforcing Award, by Order under the 1 & 2 Vict. c. 110, s. 18, or by Attachment.

1. *Time for moving.*—An order, under the 1 & 2 Vict. c. 110, s. 18, for payment of money pursuant to an award,—upon a reference by judge's order of a cause and all matters in difference between the parties,—may be granted before the time for moving to set aside the award has expired; the motion in that case being in the nature of a writ of error, and not of a motion in arrest of judgment. *Hare v. Fleay,*
- 472
2. *Demand.*—The award directed the defendant to pay a certain sum "to the plaintiff, or to Mr. S., his attorney:"—Held, that a demand by S. was sufficient to found a motion for an attachment, or a motion under the 1 & 2 Vict. c. 110, s. 18. *Id.*

ARREST OF JUDGMENT.

Time for moving.

The court will not, unless by consent, enlarge the time for moving in arrest of judgment, or for judgment *non obstante veredicto*, until after the determination of issues of law.

Harrison v. The Great Northern Railway Company,

542

ASSESSMENT OF DAMAGES.

See NEW TRIAL.

ASSIGNMENT.

See FRAUDULENT ASSIGNMENT.

ASSUMPSIT.

Effect of Payment of Money into Court upon a general Count in Indebitatus Assumpsit—See PAYMENT INTO COURT, 1.

And see PLEADING, I.

ASSURANCE.

See INSURANCE.

ATTACHMENT.

I. *For Disobedience of a Judge's Order—See ATTORNEY, II.*

II. *For disobedience to a Subpoena.*

Upon discharging a rule nisi for an attachment against a witness for disobedience to a subpoena, a copy of which had been tendered to him enclosed in an envelope, the court refused to allow the costs of showing cause, though the witness swore that the original writ of subpoena was not shown, or the nature of the document explained, to him at the time of the alleged service,—there appearing to have been some "approximation" to the offence imputed to the witness. *Marshall v. The York, Newcastle, and Berwick Railway Company,*

395

III. *For Non-Payment of Money pursuant to an Award—See ARBITRAMENT, 2.*

IV. *Against Sheriff's Officer for Extortion.*

Upon a levy of debt and costs under a *fi. fa.* the officer is not entitled to charge a fee for "search" or "discharge." *Masters v. Lowther*

948

In such a case the affidavits upon a motion for an attachment against the officer, are properly intituled in the original cause. *Id.*

ATTORNEY.

I. *Lien of.*

Costs of issues in fact found for the plaintiff, and costs of a judgment on demurrer given for the defendant, in the same suit, "are interlocutory costs," within the meaning of the 93d rule of Hilary Term, 2 W. 4 and may be set off against each other, without regard to the attorney's lien. *Scott v. De Richebourg,*

447

II. *Attachment against, for Disobedience of a Judge's Order.*

1. An attachment for disobedience of a judge's

order cannot issue against two partners, unless each has been served with the order.

Ex parte Willand, 544

2. An order having been made directing an attorney to deliver up certain deeds to a client,—the court granted an attachment against him, for refusing to deliver them up unless the client would pay him for a schedule thereof, to be kept by the attorney. *Id.*

III. *Liability for Acts of his Clerk in the course of his Business.*

Where an attorney's clerk had fraudulently simulated the court seal upon a writ of summons, the court set aside the writ and all proceedings thereon, and ordered the attorney (though blameless) personally to pay the costs. *Dunkley v. Farris,* 457

AUCTION.

See VENDORS AND PURCHASERS.

AVERAGE.

See CORN AVERAGE.

AWARD.

See ARBITRAMENT.

BAILIFF.

See COUNTY COURT, VI.

BANK.

See JOINT-STOCK BANK.

BANK-NOTES.

See EXECUTION.

BARON AND FEME.

See VOLUNTARY CONVEYANCE.

BENEFICE, PRESENTATIVE.

See QUARE IMPEDIT, 3.

BILL OF EXCHANGE.

I. *Plea of Want or Failure of Consideration.*

1. In assumpsit by payee against maker on a promissory note payable on demand, with interest,—the defendant pleaded, that the note was made by the defendant as a collateral security for a debt due from one J. S. to the plaintiff; that the defendant was not, at the time of making the note, or ever, liable to pay the debt, or to give the note as a security for the same; and that there never was any other consideration for the making of the note, save as aforesaid:—Held, a sufficient plea of no consideration, after verdict. *Crofts v. Beale,* 172
2. To a count on a promissory note, the defendant pleaded that the note was given without

consideration, and then went on to allege that it was obtained from him by the plaintiff upon a representation that he the defendant was indebted to the plaintiff in the sum mentioned in the note, whereas in truth and in fact no such sum of money, or any part thereof, was ever due from the defendant to the plaintiff:—Held, sufficient, without alleging that the representation was made fraudulently. *Southall v. Rigg,* 481

3. To a count upon a promissory note, the defendant pleaded "that he was indebted to one F. in the sum of 10*l.* 14*s.* 11*d.*, and no more; that the plaintiff fraudulently, deceitfully, and falsely represented to the defendant that there was due from the defendant to F. the sum of 32*l.* 6*s.* 10*d.*, and then demanded of, and by means of such representation as aforesaid, induced the defendant to deliver to him the note in the count mentioned." It was proved, and found by the jury, that the note was obtained by a false representation by the plaintiff that 32*l.* 6*s.* 10*d.* was due, but that such representation had been made without fraud:—Held, that the evidence sustained the plea; for, that the words "fraudulently and deceitfully" might be rejected, and that the plea was in substance a plea of partial failure of consideration. *Forman v. Wright,* 481

II. *Conditional Payment.*

To debt on simple contract for goods sold and delivered, work and labour, &c., the defendant pleaded "as to 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof," that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the plaintiff drew a bill on C. for 33*l.* 10*s.*, payable to the plaintiff's order three months after date; that C. accepted the bill, and delivered it to the plaintiff, and the plaintiff received it, for and on account of the said sum of 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof; and that the plaintiff endorsed and delivered the bill to one D., who was, before and at the time of the commencement of the suit, the holder of the bill, and entitled to sue C. thereon:—Held, that the giving of the bill by C. must be taken to be a conditional payment on behalf of the defendant; that the condition to defeat it not having happened, it operated as an absolute payment; and that it might be, and had been, adopted by the defendant in his plea, and consequently that it barred the action. *Belshaw v. Bush,* 191

III. *Plea of Usury.*

The 7th section of the statute 3 & 4 W. 4, c. 98,—which exempted from the operation of

the usury laws bills and notes made payable at or within *three months* after date, or not having more than *three months* to run,—is not repealed by the subsequent statutes 7 W. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 37, which extended the exemption to bills and notes made payable at or within *twelve months* after date, or not having more than twelve months to run, and to contracts for the loan or forbearance of money above 10*l.*,—with a proviso, that nothing in the last-mentioned act contained “shall extend to the loan or forbearance of any money upon the security of any lands, tenements, or hereditaments, or any estate or interest therein.” Where, therefore, in an action upon a bill payable two months after date, the defendant pleaded that the bill was given in pursuance of a corrupt agreement for a loan of money upon usurious interest, and the plaintiff replied that the transaction took place after the passing and coming into operation of the 3 & 4 W. 4, c. 98, s. 7:—Held, that the replication was a good answer to the plea; and that the effect of the replication was not avoided by a rejoinder that the transaction took place after the passing and coming into operation of the statutes of Victoria. *Clack v. Sainsbury*, 695

IV. Notice of Dishonour.

Verbal Notice.—1. On the day after a bill became due, the holder's clerk called upon the drawer, and told him that the bill had been duly presented, and that the acceptor “could not pay it;” to which the drawer replied, that “he would see the holder about it:”—Held, that it was properly left to the jury to infer from this conversation that the drawer had due notice of dishonour. *Metcalf v. Richardson*, 1011

2. *Semble*, that a *verbal* notice of dishonour is not to be construed with the same strictness as a *written* notice,—provided there be enough to warrant the jury in assuming that the party to whom the notice is given, is informed that the bill has been duly presented and dishonoured, and that he is looked to for payment. *Id.*

BILL OF LADING.

Duty of Consignee of—See TROVER.

BOTTOMRY BOND.

See INSURANCE, I.

BUILDING SOCIETY.

See Index to Registration Appeals, I. 1,—ante, 1065.

CARRIER.

See RAILWAY COMPANY, I. II.

CASE.

I. For Conspiracy.

1. *Allegation of Damage.*—Case will not lie against two persons for conspiring together, maliciously and vexatiously, and without reasonable or probable cause, to commence, and commencing, an action against the plaintiff, in the name of a third person, but for their own benefit,—without an allegation of legal damage resulting to the plaintiff therefrom. *Cutterell v. Jones*, 713
2. Whether or not it will lie with such an allegation,—*quære.* *Id.*
3. Where, therefore, a declaration alleged that A. and B. intending to extort money from C., maliciously and vexatiously, and without reasonable or probable cause, conspired together to commence, and did maliciously, &c., commence an unfounded action against C. in the name of D., but for their own benefit, knowing D. to be a pauper, and that, in further pursuance of the said conspiracy, &c., they maliciously, &c., prosecuted the action until afterwards, to wit, on, &c., when D. was nonsuited therein; and then proceeded to allege that afterwards it was considered by the Court that D. should take nothing by his writ, but that he and his pledges to prosecute should be in mercy, &c.,—“whereupon and whereby the said suit was and is wholly ended and determined;”—and, that by means of the premises, C. had been put to costs, which, by reason of D.'s insolvency, he had been unable to obtain:—Held, that no cause of action was disclosed,—the declaration showing no award of costs of the nonsuit in the action against C.; and “extra costs,” *ex concessis*, forming no ground of legal damage. *Id.*

II. For Negligence.

- A. contracted with parish officers to pave a certain district, and entered into a sub-contract with B., under which the latter was to lay down the paving of a street, the materials being supplied by A., and brought to the spot in his carts. Preparatory to the paving, the stones were laid, by labourers employed by B., on the pathway, and there left unguarded at night, in such a manner as to obstruct the same, and C. fell over them, and broke his leg:—Held, that B. was responsible for this negligence, and not A. *Overton v. Freeman*, 367

And see RAILWAY COMPANY, II.

CASH.

See EXECUTION.

CHARGE UPON LAND.

See Index to Registration Appeals, I. 1,—ante, 1065.

CHURCHES.

Union of—See QUARE IMPEDIT.

CLAIM, NOTICE OF.

See Index to Registration Appeals, II. 3,—ante, 1066.

CLERK.

See ATTORNEY, III.

COMPANY.

See JOINT-STOCK BANK.

JOINT-STOCK COMPANY.

RAILWAY COMPANY.

CONCURRENT JURISDICTION.

See COUNTY COURT, I.

CONDITION.

Vot to charge or assign—See ANNUITY.

CONDITIONAL PAYMENT.

See BILL OF EXCHANGE, II.

CONDITIONS OF SALE.

See VENDORS AND PURCHASERS.

CONSIDERATION.

Want or Failure of—See BILL OF EXCHANGE, I.

CONSIGNEE.

Of Bill of Lading, Duty of—See TROVER.

CONSPIRACY.

Maliciously to sue—See CASE, I.

CONTRACT.

I. Construction of.

A contract under seal recited that the defendants, a railway company, were "desirous of being supplied with 350,000 sleepers of Dantzic or Memel timber." This contract was based upon a specification, prepared by the company, in which it was stated, that, "the number of sleepers required under this specification is 350,000; one-half will have to be delivered in 1847, and the remainder by Midsummer, 1848;" that, "the deliveries are to be made either by stacking the sleepers upon a wharf, or properly loading them into a boat or barge, or other vessel, as may be directed by the resident engineer;" and that the payments were to be made upon the engineer certifying the due delivery of each cargo. By the contract, the plaintiffs covenanted to supply the company with 350,000 sleepers of the quality and description mentioned, and to deliver them, within the times mentioned in the specification, "as and when,

and in such quantities, and in such manner, as the engineer of the company should by order or requisition in writing, from time to time, within the period limited by the specification, direct or require." The engineer was to be at liberty, at any time before the complete execution of the contract "by the delivery of the whole number of 350,000 sleepers," to alter their size, form, or construction, or to vary the times of delivery "of any of the said sleepers which should not then have been delivered." And the defendants, in consideration of the premises, covenanted to pay to the plaintiffs, "for or in respect of the said sleepers hereinbefore contracted to be supplied," a certain price, upon their engineer certifying the due delivery of each cargo. And it was further agreed that 2000*l.* of the price should be retained by the company until two months after their engineer should have certified that "the whole of the said 350,000 sleepers hereinbefore agreed to be supplied by the said contractors, shall have been supplied:" Held, that this was a positive contract by the plaintiffs to supply, and by the defendants to take and to pay for, the whole number of 350,000 sleepers; and that the plaintiffs were entitled to notice of the times when the sleepers would be required. *Harrison v. The Great Northern Railway Company*, 815

II. *Effect of payment of Money into Court in an Action upon a Special Contract—See PAYMENT INTO COURT, 2.*

CONTRIBUTORY.

Action against—See JOINT-STOCK COMPANY, II.

CONVERSION.

See TROVER.

CORN AVERAGE.

Computation of Rent by.

In a lease of land for twenty-one years from the 25th of March, 1848, it was covenanted that the lessee should pay a stipulated sum for the first year,—with a proviso that the rent for each subsequent year of the term should be reduced or increased according to "the average price of wheat in any one year of the said term," such average "to be taken and ascertained from the then current year's averages which were taken in the month of January in every year under and by virtue of the tithe commutation act 6 & 7 W. 4, c. 71, s. 56," which is the result of the sales "during seven years ending on the Thursday next before Christmas Day then next preceding:—Held, that the rent must be computed according to such septennial average so published in each year. *Kendall v. Baker*, 842

COSTS.

I. *Issues of Law and Fact.*

The declaration contained three counts, to the first and third of which the defendant demurred, paying 25s. into court on the second, and pleading non assumpsit to the fourth. The plaintiff joined in demurrer, took out the 25s. in satisfaction as to the second count, and joined issue on the plea to the fourth count. At the trial there was a verdict for the defendant on the issue upon the fourth count, and a contingent assessment of damages for the plaintiff on the demurrers to the first and third counts; and the plaintiff afterwards obtained judgment on the demurrers:—Held, that the defendant, having succeeded upon the only issue of fact, was entitled to the costs of the trial,—deducting the costs which the plaintiff would have been entitled to upon a writ of inquiry as to the first and third counts. *Smith v. Hartley*, 678

II. *Of inquiry under 8 & 9 Vict. c. 18, s. 68.*

A party whose land has been "damaged or injuriously affected" by the execution of the works of a railway company, and who, in a proceeding initiated by himself under the 68th section of the lands clauses consolidation act, 8 & 9 Vict. c. 18, recovers by the verdict of a jury a larger sum than that tendered by the company, is entitled to the costs of the inquiry before the sheriff,—the earlier provisions of the statute as to the manner of assessing compensation, being virtually incorporated in that section. *Richardson v. The South Eastern Railway Company*, 154

III. *Of Interpleader Issue.*

Where a new trial of an interpleader issue is necessary by the miscarriage of the jury, the general rule as to costs prevails: *aliter*, where by the misconduct of the party. *Janes v. Whitbread*, 406

IV. *Set-off of Costs.*

Costs of issues in fact found for the plaintiff, and costs of a judgment on demurrer given for the defendant, in the same suit, are "interlocutory costs," within the meaning of the 93d rule of Hilary Term, 2 W. 4, and may be set off against each other, without regard to the attorney's lien. *Scott v. De Richebourg*, 447

V. *Where Debt recoverable in a County Court.*

See COUNTY COURT, V.

VI. *Mileage.*

At a meeting of the judges held at Serjeant's Inn on April the 16th, 1849, it was unanimously resolved, that, in all cases, mileage shall be allowed to an attorney attending an assize town, whatever the number of causes may be in which he is engaged, and that the charge in respect thereof shall be equally

apportioned to each cause. *Reg. Gen. Easter 1849*, 50

COUNTY COURT.

I. *Concurrent Jurisdiction.*

1. Where a statute confers an authority to do a judicial act in a certain case, it is imperative, on those so authorized, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. *Macdougall v. Paterson*, 755
2. The word "may," in the 13th section of the county courts extension act, 13 & 14 Vict. c. 61,—which provides, that, in certain cases, the court or a judge at chambers may by rule or order direct that the plaintiff shall recover his costs,—is not used to give a discretion, but to confer a power upon the court and judges; and the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises. *Id.*
3. Where a man, having his permanent residence at one place, has a lodging, for a temporary purpose only, at another place,—he does not "dwell" at the latter place, within the meaning of the 128th section of the county court act, 9 & 10 Vict. c. 95, so as to oust the jurisdiction of the superior courts. *Id.*
4. Where a plaintiff has two places of abode, one within, the other beyond twenty miles from the defendant,—*quære* whether the superior courts have not concurrent jurisdiction with the county court. *Id.*

II. *Order of, where Debtor discharged under the Insolvent Act.*

1. One who has obtained his discharge under the insolvent debtors act is still liable, at the discretion of the judge of a county court, to be committed, under the 99th section of the 9 & 10 Vict. c. 95, for disobedience of an order made upon a judgment summons under s. 98, obtained after such discharge. *Abley v. Dale*, 378
2. But, *semble*, that the discretion is one which ought to be exercised with extreme caution, and only under very special circumstances. *Id.*

III. *Duty and Liability of Clerk.*

1. The clerk of the county court is a mere ministerial officer, to carry into effect the order of the judge, and is not liable in trespass for the imprisonment of a party under a warrant of the court signed and issued by him in the mere performance of the duty cast upon him by the statute; although the order of the judge upon which the warrant is founded is bad,—e. g. that the debtor pay the debt at a future given day or be imprisoned for thirty days. *Dewes v. Riley*, 434
2. In such case, the defence is admissible under

"not guilty, by statute," by virtue of the 13 & 14 Vict. c. 61, s. 19. *Dewee v. Riley*, 434

3. The record of the proceedings in the county court, is, the entry directed to be made by the clerk, under the 9 & 10 Vict. c. 95, s. 111.

Id.

IV. Appeals.

1. *Informality in Plaint.*]—The court will not take notice of any informality in the plaint in the county court; that being matter of practice to be dealt with by the judge at the hearing. *Sargent, app., Wedlake, resp.*, 732

2. *Release.*]—On the morning of the trial of a plaint at the suit of several parties, the clerk of the defendant's attorney went to one of the plaintiffs, an illiterate person, and obtained his "mark" to a peculiarly-worded release. The judge of the county court, observing that the release was evidently a trick, gave judgment for the plaintiff:—Held, that the circumstances under which the release was obtained, afforded some evidence of fraud, so as to justify the judge in declining to give effect to it. *Id.*

3. *Sufficiency of Bond.*]—A defendant against whom judgment had been recovered in a plaint in the county court on the 17th of January, on the 22d gave a notice of appeal, in which was set forth the grounds of appeal, and on the 23d entered into a bond, with a surety, for the costs of the appeal, and for the amount of the judgment; on the 24th he withdrew the notice of appeal, and gave a fresh one stating the grounds of appeal:—Held, that the bond given on the 23d was a sufficient compliance with the 14th section of the 13 & 14 Vict. c. 61, and that it was competent to the court to entertain the appeal. *Daniels, app., Charsley, resp.*, 739

4. *Contract of Service.*]—In 1846, the defendant entered into the service of the plaintiff, a solicitor at Amersham, as his clerk, and, in December, 1849, the plaintiff put an end to the service, by a notice, to expire on the 25th of March, 1850. On the 7th of January, 1850, the defendant wrote to the plaintiff, asking to be paid his salary to Lady-Day, and to be at once discharged, "in order that he might go to London and remain there until he could meet with another engagement." To this letter the plaintiff replied, assenting to the defendant's proposal, saying—"Of course, I should have expected your services, if you were in Amersham; but, as you request me at once to pay your salary to Lady-Day, in order that you may go to town until you meet with another engagement, I consent to accord your request:" and, on the following day, the plaintiff asked the defendant whether, "if he paid him up to the 25th of March, he intended going to town and remaining there till he got another engagement," to which the defendant answered that

he did; whereupon the plaintiff said,—“on these conditions, I am prepared to pay your salary at once up to Lady-Day; but, if you remain in Amersham, I shall expect your services,”—and accordingly paid him the full quarter's salary. The defendant went to London, but shortly afterwards, and before Lady-Day, returned to Amersham at the request of a client of the plaintiff's, in whose employ he remained, giving professional advice:—Held, that there was no evidence of a contract on the part of the defendant to go to London and remain there, or to forbear to give his services in Amersham to any person other than the plaintiff, or to render service to the plaintiff if he should return to Amersham. *Daniels, app., Charsley, resp.* 739

5. *Costs.*]—The successful party on an appeal from a decision of a county court, is entitled to the costs of the appeal. *Id.*

V. Costs.

1. *Suggestion.*]—Where, in tort, there was an issue of law and an issue of fact, and both were determined in favour of the plaintiff, but the damages recovered were less than 5*l.*, and there was a suggestion to deprive the plaintiff of costs under the 9 & 10 Vict. c. 95, s. 129,—Held, that the plaintiff was not entitled to any costs. *Abley v. Dale*, 889
2. *Where Debt reduced on a Plea of Tender.*]—A plaintiff who recovers in an action of debt a sum which together with a sum paid into court on a plea of tender exceeds 20*l.*, is entitled to the costs of the action, notwithstanding the 11th section of the 13 & 14 Vict. c. 61. *Crosse v. Seaman*, 524
3. *Of Appeal.*]—The successful party on an appeal from a decision of a county court, is entitled to the costs of the appeal. *Daniels, app., Charsley, resp.* 739

VI. Execution.

1. A bailiff of a county court who seizes, on behalf of a judgment-creditor, goods in possession of a third person by virtue of an assignment which is good as against all but creditors, is bound, in justifying the seizure, in trespass at the suit of such third person, to prove the legal authority under which he seized on behalf of such creditor, viz. the judgment. *White v. Morris*, 1015
2. In trespass against an execution-creditor and a bailiff of the county court for seizing goods under such circumstances, the plaintiff put in the warrant of execution, with the endorsement thereon by the officer that he had taken the goods under it:—Held, that the bailiff, as well as the execution-creditor, was bound to prove the judgment; and that the warrant, reciting the judgment (though put in by the plaintiff), was no evidence of such judgment. *Id.*

VII. *Notice of Action.*

The circumstance of the bailiff of a county court having, in taking goods, acted under an indemnity from the execution creditor, does not deprive him of the protection of the 138th section of the 9 & 10 Vict. c. 95, which entitles him to a notice of action for anything done by him in pursuance of the act. *White v. Morris*, 1015

COVENANT.

Construction of.

1. In 1836, a company (afterwards called the West London Railway Company) was incorporated by act of parliament, for the making of a railway from the Kensington Canal, to join the London and Birmingham (afterwards called the London and North-Western) and the Great Western railways, at a place called Holsden Green; and certain duties were by the act cast upon the company; and, amongst other things, it was provided, that, if the railway should be abandoned, or should, after its completion, cease for the space of three years to be used as a railway, the land taken by the company for the purposes of the act, should revert to the owners of the adjoining land.

In February, 1837, the West London Railway Company entered into an agreement with the Great Western Railway Company, under which the last-mentioned company bound themselves to stop certain of their trains at a point where their railways intersected the West London Railway, for the purpose of taking up or setting down passengers travelling on that line.

By a subsequent act (8 & 9 Vict. c. clvi.),—reciting, that “it had been found that the said West London Railway could not be worked, as a separate and independent undertaking, with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connexion with the said London and Birmingham Railway and the said Great Western Railway, or either of them, by both or either of the companies to whom the said last-mentioned railways belonged; that the West London Railway Company were therefore desirous of letting the said railway on lease to the London and Birmingham Railway Company; and that the last-mentioned company were willing to accept such lease, subject to certain terms and conditions which had been mutually agreed on between the said two companies,”—the West London Railway Company was authorized to lease to the London and North-Western Railway Company their railway, and all their rights, powers, and privileges in relation thereto,—subject to the provisions

of the act, and to the performance of the conditions to be mentioned in such lease.

By the lease, which was afterwards executed in pursuance of this act, the London and North-Western Railway Company covenanted, amongst other things, that they would “at their own expense, during the continuance of the lease, *efficiently* work and repair the railway and works thereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges, and expenses, claims, and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway or works: but the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham (North-Western) Railway Company of the West London Railway or works.”

In covenant by the West London Railway Company against the London and North-Western Railway Company for a breach of this covenant:—

Held, that the defendants were not bound to work the West London Railway in connexion with and as part of their own line; nor did they acquire by force of the lease, or of the act of parliament authorizing the making of the lease, any right, or incur any obligation, to call upon the Great Western Railway Company to stop their trains pursuant to the agreement of February, 1837. *The West London Railway Company v. The London and North-Western Railway Company*, 254

2. Held also, that, by the terms of their covenant, the defendants were not bound to work the West London Railway with *passenger* trains; but that they satisfied the obligation they had entered into, “*efficiently*” to work the railway, provided they worked it in a reasonable manner, and so as to indemnify the plaintiffs against any damage or any forfeiture that would result under the act of parliament from a failure to work the line. *Id.* 319

3. In 1836, a company (afterwards called the West London Railway Company) was incorporated by act of parliament, for the making of a railway from the Kensington Canal, to join the London and Birmingham (afterwards called the London and North-Western) and the Great Western railways, at a place called Holsden Green; and certain duties were by the act cast upon the company; and, amongst other things, it was provided, that, if the railway should be abandoned, or should, after its completion, cease for the space of three years to be used as a railway, the land taken by the company for the purposes of the act, should revert to the owners of the adjoining land.

In February, 1837, the West London Railway Company entered into an agreement with the Great Western Railway Company, under which the last-mentioned company bound themselves to stop certain of their trains at a point where their railway intersected the West London Railway, for the purpose of transferring passengers and goods from one railway to the other, and to stop their trains for the purpose of meeting corresponding trains of that company, in the manner particularly detailed in the deed.

In 1840, another act, 3 & 4 Vict. c. cv., passed, giving further powers to the West London Railway Company; the 34th section, reciting the agreement of February, 1837, regulated the mode of crossing until the plaintiffs' railway should be completed; the 36th section saved the plaintiffs' rights under that agreement; and the 37th section provided, that, if the plaintiffs' line was abandoned, or ceased to be used as a railway for three years after its completion, then, on payment or tender to them by the Great Western Railway Company of the purchase-money of the piece of land where the railways crossed, the said land should vest in the Great Western Railway Company.

By a subsequent act (8 & 9 Vict. c. clvi.),—reciting, that “it had been found that the said West London Railway [which it appeared in evidence had been worked with *passenger* trains as well as with *goods* trains] could not be worked, as a separate and independent undertaking, with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connexion with the said London and Birmingham Railway and the said Great Western Railway, or either of them, by both or either of the companies to whom the said last-mentioned railways belonged; that the West London Railway Company were therefore desirous of letting the said railway on lease to the London and Birmingham Railway Company; and that the last-mentioned company were willing to accept such lease, subject to certain terms and conditions which had been mutually agreed on between the said two companies,”—the West London Railway Company was authorized to lease to the London and North-Western Railway Company their railway, and all their rights, powers, and privileges in relation thereto,—subject to the provisions of the act, and to the performance of the conditions to be mentioned in such lease.

By the lease, which was afterwards executed in pursuance of this act, the London and North-Western Railway Company covenanted, amongst other things, that they would “at their own expense, during the continuance

of the lease, *efficiently work* and repair the railway and works thereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges and expenses, claims and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway or works; but the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham (North-Western) Railway Company of the West London Railway or works:”—

Held, upon exceptions to the ruling of the chief justice of the Common Pleas, in an action of covenant by the West London Railway Company against the London and North-Western Railway Company for a breach of this covenant,—

First,—That, in order to perform their covenant to work *efficiently*, the defendants were not bound *under all circumstances* to work the line for *passenger* traffic; but that, if as much gross proceeds could be obtained by *efficiently* working the railway for goods only, as for passengers only, or for both passengers and goods, the covenant was well performed. PLATT, B., and MARTIN, B., not concurring.

Secondly,—That the agreement of February, 1837, with the Great Western Railway Company, was, by virtue of the provisions in the leasing act, and the lease itself, transferred to the defendants, the lessees; and, consequently, that they *had power* to compel the Great Western Railway Company to stop trains on their line pursuant to the provisions of that agreement.

Thirdly,—That although the defendants had power to stop the Great Western trains, they were not bound to exercise it *necessarily* as a part of the efficient working of the line demised; and that they were not bound *necessarily* to work the demised line in connexion with the trains on the Great Western Railway.

Fourthly,—That there was no covenant in the lease to bind the defendants to work the demised line in connexion with either or both their own or the Great Western Railway: but that it would be for the jury to say whether or not they could practically work the line *efficiently*, without some connexion with one or other of those railways.

Fifthly,—That, for the purpose of considering the liability of the defendants, they were not to be treated by the jury as if they were lessees of a separate and independent line, having no control over the other two railways; but that the covenant to work the demised line *efficiently*, must be construed with a

reference to the subject-matter, and the character of the defendants. *The West London Railway Company v. The London and North-Western Railway Company*, 327

4. Held also, that the obligation of the defendants under their covenant was not limited,—as decided by the court below,—to the indemnification of the plaintiffs from the obligations cast upon them by their acts of incorporation. *Id.*

5. And that the defendants were bound to work the railway efficiently,—so as to secure the stipulated benefits to the plaintiffs in the share of gross proceeds; but were not compelled to work it so as to produce the *largest* quantity of gross proceeds. *Id.*

DAMAGES.

See NEW TRIAL.

DEBT.

Effect of Payment of Money into Court in an Action of—See PAYMENT INTO COURT, 1.
And see PLEADING, II.

DECEIT.

See BILL OF EXCHANGE, I. 3.

DECLARATIONS.

See EVIDENCE.

DEED.

See VOLUNTARY CONVEYANCE.

DEMAND.

Of Money awarded—See ARBITRAMENT, 2.
Particulars of—See PARTICULARS.

DEMURRER BOOKS.

Delivery of.

1. Where the plaintiff has, upon the defendant's default, in *due time* delivered the demurrer books for him to the two junior judges, the defendant cannot be heard, but the plaintiff will have judgment, unless the defendant appears and pays for the books so delivered for him. *Dorsett v. Aspdin*, 651
2. In this court, a previous notice of the plaintiff's intention to take the objection, is not required. *Id.*

DEPOSIT OF DEEDS.

See MORTGAGE.

DEVISE.

Construction of—See ANNUITY.

DIFFERENCES.

See GAMING.

DISHONOUR.

Notice of—See BILL OF EXCHANGE, IV.

DISSENTING MINISTER.

See *Index to Registration Appeals*, I. 2,—*ante*, 1065.

DISTRINGAS.

See PRACTICE, I. 3.

DWELLING.

Within the meaning of the County Courts Act.

1. Where a man, having his permanent residence at one place, has a lodging, for a temporary purpose only, at another place,—he does not “dwell” at the latter place, within the meaning of the 128th section of the county court act, 9 & 10 Vict. c. 95, so as to oust the jurisdiction of the superior courts. *Macdougall v. Paterson*, 755
2. Where a plaintiff has two places of abode, one within, the other beyond twenty miles from the defendant,—*quære* whether the superior courts have not concurrent jurisdiction with the county court. *Id.*

ECCLESIASTICAL LAW.

See QUARE IMPEDIT.

EJECTMENT.

Particulars of Premises.

The court will only under special circumstances grant an order for particulars of the premises sought to be recovered in an action of ejectment. *Doe d. Saxton v. Turner*, 896

EQUITABLE MORTGAGE.

See MORTGAGE.

ESTOPPEL.

See PLEADING, IV. 10.

EVIDENCE.

I. Admissions by a Party.

An abstract and affidavit used by a party upon a reference before the master, to prove title in himself, are admissible evidence against him in a subsequent action, upon the principle laid down in *Slaterie v. Pooley*, 6 M. & W. 664. *Pritchard v. Bagshawe*, 459

II. Nisi Prius Record.

The nisi prius record, showing that the writ of summons issued within six years of the accrual of the cause of action, is not conclusive evidence to prevent the operation of the statute of limitations. Whether it is even *prima facie* evidence for that purpose,—*quære*. *Pritchard v. Bagshawe*, 459

III. Examined Copy of Roll.

1. Where the writ of summons has been continued by *alias* and *pluries*, in order to prevent the operation of the statute, it is neces-

sary for the plaintiff to show that the endorsement of a memorandum containing the day of the date and return (?) of the first writ, required by the 10th section of the 2 W. 4, c. 39, was made upon the last writ before the service thereof upon the defendant.

Pritchard v. Bagshawe, 459

2. An examined copy of the roll containing such endorsements, is not evidence of the fact: neither is the writ itself. *Id.*

IV. Contents of Written Documents.

1. A witness cannot, upon cross-examination, even for the purpose of discrediting him, be asked as to the contents of a written paper which is neither produced nor its absence accounted for. *Macdonnell v. Evans*, 930
- 2 Therefore, where a witness was asked, upon cross-examination,—a letter in his own handwriting being shown to him,—“Did you not write that letter in answer to a letter charging you with forgery?”—Held, that the question was inadmissible for any purpose, inasmuch as it was an attempt to get at the contents of a written document which for anything that appeared might have been produced. *Id.*

V. Proof of Records.

Ordered, “that no more of a court or a judge for the issuing a *subpœna duces tecum*, where an original record is required, be made, unless the court or judge be satisfied that there is good reason for requiring the original record; and that no such *subpœna* be issued until such order has been produced to the officer issuing the same, and filed with him, and until the writ has been made conformable to the description of the document contained in such order. *Reg. Gen. M. T.* 1851, 814

VI. Rule in *The Queen's Case*.

As to cross-examination of witness touching the contents of a written document,—ante, IV.

VII. Proof of Judgment in an Action against the Sheriff or other Officer—See TRESPASS.

VIII. Secondary Evidence.

What a sufficient search to let in secondary evidence of the contents of a deed—See VOLUNTARY CONVEYANCE.

IX. Declarations.

Declarations made by a party to a deed, as to its contents, where admissible in evidence as cutting down his title. *Doe d. Richards v. Lewis*, 1035

EXECUTION.

Bank-Notes and Money.

The effect of the statute 1 & 2 Vict. c. 110, s. 12, is, to place bank-notes and money seized under a *fi. fa.* upon the same footing as goods; and therefore, bank-notes so seized are not to

be treated as the property of the execution-creditor, so as to be available in the sheriff's hands to satisfy a writ of *fi. fa.* lodged with him against such execution-creditor at the suit of a third person. *Collingridge v. Paxton*, 683

EXECUTION-CREDITOR.

See TRESPASS.

EXECUTOR.

Liability for Testator's Debts—See STATUTE OF FRAUDS.

EXTORTION.

See SHERIFF, III.

FAILURE OF CONSIDERATION.

See BILL OF EXCHANGE, I.

FIERI FACIAS.

See EXECUTION.

FRAUD.

See BILL OF EXCHANGE, I. 2, 3.
RELEASE.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT ASSIGNMENT.

Of a Trader's Effects.

1. *For Benefit of Creditors.*—An assignment of all a trader's effects, *bond fide* executed, to a trustee for the general benefit of all his creditors, is not void, either at common law or under the statute 13 Eliz. c. 5, though it contains a clause empowering the trustee to employ the grantor, “or any other persons or person, in winding up the affairs of the grantor, and in collecting and getting in his estate and effects thereby assigned, and in carrying on his trade, if thought expedient by him”—if (distinguishing it from the deed in *Owen v. Body*, 5 A. & E. 28, 6 N. & M. 448) it appears from the whole scope of the deed, that the carrying on the trade was merely subsidiary to the general purpose of sale and distribution. *Janes v. Whitbread*, 406
2. *Misnomer.*—A trader assigned all his property and effects to a trustee for the benefit of his creditors,—the trustee being therein described throughout as “James James, of, &c., tailor,” but executing the deed by his true name of “James Janes:”—Held, that the misdescription did not prevent the property from passing to him. *Id.*

FRAUDULENT CONVEYANCE.

Void as against Creditors.

Where goods are assigned as security for an

advance of money, upon trust to permit the assignor to remain in possession of them until default in payment at the time stipulated, and upon further trust to sell them upon such default being made,—such assignment, though void as against creditors, is good as between the parties, and as between either party and a stranger. *White v. Morris*, 1015

And see VOLUNTARY CONVEYANCE.

FREEHOLD INTEREST.

See *Index to Registration Appeals*, I. 2,—ante, 1065.

FREEMAN.

See *Index to Registration Appeals*, II. 2,—ante, 1066.

GAMING.

Differences on Railway Shares.

1. The declaration alleged a contract for the sale by B. to A. of railway shares at a certain price, and a subsequent contract for the sale by A. to B. of other railway shares at an advanced price, and an agreement that the two sets of shares should be set off against each other, and the differences paid by B. to A.:—Held, that a general plea of gaming, founded on the 18th section of the 8 & 9 Vict. c. 109, was bad, on special demurrer: it ought to have shown the circumstances relied on to bring the transaction within the act. *Grizewood v. Blane*, 526
2. *Quære*, whether, in such a plea, the defendant should not negative the exception of lawful games, in s. 18? *Id.*
3. A colourable contract for the sale and purchase of railway shares, where neither party intends to deliver or to accept the shares, but merely to pay "differences" according to the rise or fall of the market, is gaming within the 8 & 9 Vict. c. 109, s. 18. *Id.*, 538

HUSBAND AND WIFE.

See VOLUNTARY CONVEYANCE.

HYPOTHECATION.

See SHIPPING, I.

IDENTITY.

See VENDOR AND PURCHASER.

INDEBITATUS ASSUMPSIT.

Effect of payment of Money into Court upon a general count in,—See PAYMENT INTO COURT, 1.

INDEMNITY.

See COUNTY COURT, VII.

INSOLVENT DEBTOR.

Discharge.

1. *Plea of.*]—Assumpsit on a bill of exchange for 30*l.*, drawn by A. B. upon C. D. on the 16th of February, 1849, payable to E. F. or order, thirty-five days after date. Plea, a discharge of the acceptor under the insolvent debtors act. In support of the plea, the defendant put in his schedule, which contained the following description of the original debt:—"A. B. Debt, 30*l.*; 20*l.* money lent, 10*l.* clothes. I gave my acceptance to a bill drawn by him, 16th February, 1849, at thirty-five days:—Held, that the adjudication under the act was no discharge as to the claim of E. F. upon the bill, under the 1 & 2 Vict. c. 110, s. 75. *Lambert v. Smith*, 358
2. *Description of Debt.*]—And *semble*, that the description of the debt was not a full and true description under s. 69. *Id.*
3. *Replication.*]—A replication to a plea of set-off, stated that the defendant, being in custody within the walls of "the Queen's prison," at the suit of A. B., for debt, duly and according to the provisions of the statute 1 & 2 Vict. c. 110, petitioned the insolvent debtors court for relief, and stated in his petition, that he was willing that his estate and effects should be vested in the provisional assignee of that court; that the petition was duly subscribed by the defendant, and filed of record; and that the court, in pursuance and according to the statute, ordered that all the estate, &c., of the defendant should be vested in the provisional assignee; and that, by virtue of the statute, the debts and causes of set-off became vested in the said provisional assignee:—Held, sufficient, without proceeding to allege all the requisites of the 35th section of the act to give the insolvent debtors court jurisdiction. *Wickens v. Goethy*, 666
4. *Prison.*]—The court will take judicial notice that "the Queen's prison,"—the prison of the court,—is in England. *Id.*
- Effect on Order of a County Court.*]—One who has obtained his discharge under the insolvent debtors act is still liable, at the discretion of the judge of a county court, to be committed, under the 99th section of the 9 & 10 Vict. c. 95, for disobedience of an order made upon a judgment summons under s. 98, obtained after such discharge. *Abley v. Dale*, 378
6. But, *semble*, that the discretion is one which ought to be exercised with extreme caution, and only under very special circumstances. *Id.*

INSURANCE.

I. Insurable Interest.

A vessel having put into a foreign port in a

damaged state, the master borrowed money of a merchant there, for necessary repairs and disbursements; to secure which, he drew bills upon his owner, and also executed an instrument which purported to be an hypothecation of the ship, cargo, and freight. By this instrument, the merchant who advanced the money forbore all interest beyond the amount necessary to insure the ship to cover the advances; and the master took upon himself and his owner the risk of the voyage, making the money payable at all events, and subjecting the ship to seizure and sale by virtue of process "out of Her Majesty's high Court of Admiralty of England, or any court of Vice-Admiralty possessing jurisdiction at the port at which the said vessel might at any time happen to be lying, or to be, according to the maritime law and custom of England," in the event of the bills being refused acceptance, or being dishonoured:—Held, that, this not being such an hypothecation as could be enforced in the Court of Admiralty,—the payment of the money borrowed not being made to depend upon the arrival of the vessel, —the merchant had no insurable interest in the ship. *Stainbank v. Fenning*, 51

II. Partial Loss.

1. As a general rule, where the whole or any part of a cargo (having suffered sea-damage) is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. *Rosetto v. Gurney*, 176
2. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible; if it can, the cargo is then practically capable of being sent in a marketable state to its port of destination, the master cannot sell it, and the assured cannot recover as for a constructive total loss. The same rule applies, if a part only of the cargo can be saved. *Id.*
3. A cargo consisting of 3700 quarters of wheat, valued at 6400*l.*, was insured on a voyage from Odessa to Liverpool. Shortly after she sailed, the vessel received sea-damage, and was compelled to put back to refit. The repairs and expenses amounted to 1800*l.*, to raise which the master hypothecated the ship and cargo for 1850*l.* by a bottomry-bond payable ten days after her arrival at the port of delivery. The ship again sailed, and, before her arrival, was wrecked, and carried into Cork by salvors, where, the cargo being found to be considerably damaged, and the vessel not worth repairing, both were sold. The jury found that about one-half of the wheat might have been dried, and conveyed

from Cork to Liverpool, at a cost less than its value on its arrival at Liverpool. The vessel and cargo were taken possession of by the Court of Admiralty (who directed their sale), by whom 150*l.* and costs were awarded to the salvors, and 1881*l.* and costs to the holders of the bottomry-bond:—Held, that the evidence disclosed a partial loss only: that, in ascertaining whether or not it was practicable to send the whole or any part of the cargo to its port of destination in a marketable state, the jury were bound to take into consideration the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of trans-shipping it into a new bottom, and the cost of the difference of transit, if it could only be effected at a higher than the original rate of freight,—adding the salvage allowed in proportion to the value of the cargo saved; but not the debt and costs paid to the holders of the bottomry-bond: and that the loss would be total or partial, as the aggregate of these exceeded or fell short of the value of the cargo when delivered at the port of discharge. *Rosetto v. Gurney*, 176

III. Stranding.

Damage resulting from the ship's taking the ground on the falling of the tide, in a tide-harbour, in a spot where she is properly placed for the purpose of unloading, is not a stranding within the ordinary terms of a policy of insurance. *Magnus v. Buttemer*, 876

INTERLOCUTORY COSTS.

See Costs, IV.

INTERPLEADER ISSUE.

Costs of.

Where a new trial of an *interpleader issue* is necessary by the miscarriage of the jury, the general rule as to costs prevails: *aliter*, where by the misconduct of the party. *Janes v. Whitbread*, 406

JOINT-STOCK BANK.

Nature of Shares in.

Shares in a joint-stock company, the property of which consisted, in part, of freehold and copyhold estates, and mortgages for terms of years:—Held, not to be within the statute of mortmain, 9 G. 2, c. 36. *Myers v. Perigal*, 90

JOINT-STOCK COMPANY.

I. Liability on Contracts before Registration.

1. A joint-stock company completely registered under the 7 & 8 Vict. c. 110, is not liable upon contracts entered into by the promoters before provisional registration. *Hutchinson v. The Surrey Consumers Gas-Light and Coke Association*, 689

2. Whether a completely registered company is liable in respect of contracts within the 23d section of the statute, entered into after *provisional*, and before *complete* registration,—*quare*. *Hutchison v. The Surrey Consumers Gas-Light and Coke Association*, 689
3. A company established for the manufacture of glass, completely registered under the 7 & 8 Vict. c. 110, had power under a clause in their deed of settlement to appoint a *manager* of their works and factories, to “superintend and transact, under the control of the board of directors, the manufacturing business of the company,” and to whom the board of directors were by another clause authorized to delegate “such and so many of the powers thereby given to them, as would enable him to carry on the said works and manufacturing business in an efficient manner:”—Held, that the company were liable for goods supplied to them for the purposes of their manufactures, upon orders given by such manager, although there was no express delegation of authority. *Smith v. The Hull Glass Company*, 897
4. Held also, that the company were liable for goods supplied upon the orders of unauthorized persons,—such as, the chairman, deputy-chairman, and secretary,—where the goods were with their knowledge received upon their premises, and used by them for the purposes of their trade. *Id.*

II. Action against a Contributory.

1. An action against a contributory of a joint-stock company, in respect of a demand for which the company may be liable, is not necessarily an action against the company, or against a person authorized to be sued as nominal defendant, under the 50th section of the winding-up act, 1845, 11 & 12 Vict. c. 45. *Beardshaw v. Lord Londesborough*, 498
2. Such an action is within the 62d section, which empowers the official manager, by leave of the master, to defend the same in the official name, or in the name of the original defendant. *Id.*

JUDGE'S ORDER.

Attachment for Disobedience of—See ATTORNEY, II.

JUDGMENT.

Proof of, where the sheriff and the execution-creditor justify under process,—See TRESPASS.

JUDGMENT AS IN CASE OF A NONSUIT.

See PRACTICE, III.

JURY.

Miscarriage of—See INTERPLEADER ISSUE.

JUSTIFICATION.

See TRESPASS.

LANDLORD AND TENANT.

Notice to quit.

The defendant entered as tenant, under a written agreement, on the 7th of May, 1850, but paid no rent:—Held, that a six months' notice to quit, expiring on the 7th of May, 1851, was a good notice. *Doe d. Cornwall v. Mattheice*, 675

LANDS CLAUSES CONSOLIDATION ACT

See RAILWAY COMPANY, II^r

LAWFUL GAMES

See GAMING, 2.

LEASE.

I. *Construction of.*

Corn Rent.]—In a lease of land for 21 years from the 25th of March, 1848, it was covenanted that the lessee should pay a stipulated sum for the first year,—with a proviso that the rent for each subsequent year of the term should be reduced or increased according to “the average price of wheat in any one year of the said term,” such average “to be taken and ascertained from the then current year's averages which were taken in the month of January in every year under and by virtue of the tithe commutation act, 6 & 7 W. 4, c. 71, s. 56,”—which is the result of the sales “during seven years ending on the Thursday next before Christmas Day then next preceding:—Held, that the rent must be computed according to such septennial average so published in each year. *Kendall v. Baker*, 842

II. *Of Railway*—See COVENANT.

LIBEL.

Partial Justification.

1. A declaration for a libel imputing to an officer in the army, that he had been guilty of murder, in killing his opponent in a duel; and further alleging that the duel was supposed to have been fought under circumstances revolting to the ordinary notions of honour,—is not answered by a plea alleging merely that the plaintiff killed his antagonist, and was tried for murder, and acquitted: the defendant was bound to justify also the matter of aggravation. *Heleham v. Blackwood*, 111
2. *Semble*, that a replication setting up the acquittal of the plaintiff, by way of estoppel, would be bad. *Id.*

LIEN.

Attorney's Lien for Costs—See COSTS, IV.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LODGING.

See DWELLING.

LUNATIC.

Service of Process on.

A judge at chambers having made an order directing an appearance to be entered for a lunatic defendant, upon an affidavit of service of the writ of summons by leaving a copy with the keeper of an asylum in which the lunatic was confined, without a previous writ of *distringas*,—the court set aside the order. *Blake v. Cooper*, 680

MARRIAGE SETTLEMENT.

See VOLUNTARY CONVEYANCE.

MASTER AND SERVANT.

Contract of Service.—In 1846, the defendant entered into the service of the plaintiff, a solicitor at Amersham, as his clerk, and, in December, 1849, the plaintiff put an end to the service, by a notice, to expire on the 25th of March, 1850. On the 7th of January, 1850, the defendant wrote to the plaintiff, asking to be paid his salary to Lady-Day, and to be at once discharged, "in order that he might go to London and remain there until he could meet with another engagement." To this letter the plaintiff replied, assenting to the defendant's proposal, saying—"Of course, I should have expected your services, if you were in Amersham; but, as you request me at once to pay your salary to Lady-Day, in order that you may go to town until you meet with another engagement, I consent to accord your request:" and, on the following day, the plaintiff asked the defendant whether, "if he paid him up to the 25th of March, he intended going to town and remaining there till he got another engagement," to which the defendant answered that he did; whereupon the plaintiff said,—“on these conditions, I am prepared to pay your salary at once up to Lady-Day; but, if you remain in Amersham, I shall expect your services,”—and accordingly paid him the full quarter's salary. The defendant went to London, but shortly afterwards, and before Lady-Day, returned to Amersham at the request of a client of the plaintiff's, in whose employ he remained, giving professional advice:—Held, that there was no evidence of a contract on the part of the defendant to go to London and remain there, or to forbear to give his services in Amersham to any person other than the plaintiff, or to render service to the plaintiff if he should return to Amersham. *Daniels, app., Chareley, resp.* 739

MEMORANDA.

I. Judges of the Court of Appeal in Chancery.

Sir JAMES LEWIS KNIGHT BRUCE, Knt. . 497
The Rt. Hon. Baron CRANWORTH . . id.

II. Vice-Chancellors.

Sir RICHARD TORIN KINDERSLEY, Knt. . 497
Sir JAMES PARKER, Knt. . . id.

III. Queen's Counsel.

Anderton, James 497
Atherton, William id.
Baily, John id.
Bramwell, George William Wilshere . id.
Campbell, James 496
Chandless, Thomas id.
Coulson, Walter id.
Craig, Richard Davis 497
Daniel, William Thomas Shave . . id.
Elmsley, William 496
Follett, Brent Spencer 497
Glasse, William Bulkely id.
Hargreave, Charles James id.
Headlam, Thomas Emerson id.
Hill, Hugh id.
Ingham, Robert 496
Mellor, John 497
Pashley, Robert id.
Phillimore, John George id.
Slade, Frederick William id.
Warren, Samuel id.
Willcock, John William 496
Willmore, Graham 497

MILEAGE.

At a meeting of the judges held at Serjeants' Inn on April the 16th, 1849, it was unanimously resolved, that, in all cases, mileage shall be allowed to an attorney attending an assize town, whatever the number of causes may be in which he is engaged, and that the charge in respect thereof shall be equally apportioned to each cause. *Reg. Gen. Easter 1849*, 50

MISDESCRIPTION.

See VENDOR AND PURCHASER.

MISNOMER.

See NAME.

MONEY.

See EXECUTION.

PAYMENT INTO COURT.

MORTGAGE.

Evidence of Payment.

It is no objection to a title, upon a sale by auction, that a memorandum appears amongst the title-deeds, showing that a former owner of the property (under whom the vendor derives title) had raised money thereon by way of equitable mortgage, and that there is no evidence that such charge has been released,

other than that afforded by the vendor's possession of the deeds and memorandum.

Nicoll v. Chambers,

996

And see VOLUNTARY CONVEYANCE.

MORTMAIN.

Bank Shares.

Shares in a joint-stock bank, the property of which consisted, in part, of freehold and copyhold estates, and mortgages for terms of years:—Held, not to be within the statute of mortmain, 9 G. 2, c. 36. *Myers v. Perigal,*

90

MURDER.

Justification of Charge of—See LIBEL.

NAME.

Misnomer in Deed.

A trader assigned all his property and effects to a trustee for the benefit of his creditors, —the trustee being therein described throughout as "James James, of, &c., tailor," but executing the deed by his true name of "James Janes:"—Held, that the misdescription did not prevent the property from passing to him. *Janes v. Whitbread,*

406

NECESSARIES.

See PARENT AND CHILD.

NEGLIGENCE.

See CASE, II.

PAYMENT INTO COURT, 5.

NEW ASSIGNMENT.

See PLEADING, IV. 5.

NEW TRIAL.

Insufficient Damages.

The court refused, in an action for the negligent construction of a building, whereby it fell and injured the plaintiff, to grant a new trial, on the ground that the jury had given merely nominal damages,—there being no reason for supposing them to have been actuated by improper motives. *Howard v. Barward,*

653

And see INTERPLEADER ISSUE.

NONSUIT.

Judgment as in Case of—See PRACTICE, III.

NOT GUILTY "BY STATUTE."

See COUNTY COURT, III. 2.

NOTICE.

Of Action—See COUNTY COURT, VII.

Of Dishonour—See BILL OF EXCHANGE.

NOTICE OF CLAIM.

See Index to Registration Appeals, II. 3,—ante, 1066.

NOTICE TO QUIT.

See LANDLORD AND TENANT.

ORDER.

Under 1 & 2 Vict. c. 110, s. 18—See ARBITRAMENT.

PAPER-BOOKS.

Delivery of—See Registration Appeals, III. 1, ante, 1066.

And see DEMURRER-BOOKS.

PARENT AND CHILD.

Liability of Father for Necessaries.

The mere moral obligation on a parent to maintain his child, affords no legal inference of a promise to pay a debt contracted by him, even for necessaries. *Shelton v. Springett,*

452

PARTICULARS.

I. Of Demand, Construction of.

The plaintiff declared in his first count in a contract with the defendants to retain him in their service for one year, at a salary of 200*l.* per annum, alleging for breach that they improperly dismissed him before the end of the year; and in a second count, for work and labour. The particulars of demand were as follows:—"This action is brought to recover one year's salary, from, &c., to, &c., at the rate of 200*l.* per annum, or damages for the dismissal of the plaintiff before the end of such year:"—Held, that evidence of services actually rendered, was admissible under this particular,—upon failure to prove the special contract. *Harris v. Montgomery,*

393

II. Of Premises sought to be recovered—See EJECTMENT.

PARTICULARS.

Of Sale—See VENDOR AND PURCHASER.

PATRONAGE.

See QUARE IMPEDIT.

PAYMENT.

Conditional—See BILL OF EXCHANGE, II.

PAYMENT INTO COURT.

Effect of.

1. *In Indebitatus Assumpsit, or Debt.*—Payment of money into court upon a general count in *indebitatus assumpsit*, or in *debt*, admits only a cause of action to the amount paid into court, and operates as an admission for no other purpose. *Perren v. The Monmouthshire Railway and Canal Company,*

833

2. *On a special Contract.*—Payment of money into court upon a declaration on a *special contract*, admits the contract and the breach. *Perren v. The Monmouthshire Railway and Canal Company*, 855
3. *In Tort.*—Payment of money into court in an action of tort, amounts to no more than an admission that the plaintiff has a *cause of action*, to the extent of the money paid in, from some wrongful act of the defendant, and does not necessarily admit that the latter is guilty of the wrongful act charged in the declaration. *Schreger v. Carden*, 851
4. Payment of money into court in actions of *tort*, may, according the form of the declaration, be subject either to the rule applicable to special contracts, or to the rule applicable to general indebitatus counts: thus, where the declaration is *general and unspecific*, the payment into court admits a *cause of action*, but not the *cause of action sued for*: on the other hand, if the declaration is *specific*, the payment into court admits the cause of action so specifically stated. *Perren v. The Monmouthshire Railway and Canal Company*, 855
5. In case against a railway company, for negligence, whereby the plaintiff, a passenger, was injured, the defendants pleaded payment into court of 25*l.*, and no damages *ultra*:—Held, that the payment into court admitted the contract to carry, and the breach of the duty founded upon that contract, so as to dispense with proof of negligence,—the damages being single, and depending upon nothing beyond the mere breach of duty admitted. *Id.*

PLEADING.

I. ASSUMPSIT.

1. *Want or failure of Consideration.*—In *assumpsit* by payee against maker on a promissory note payable *on demand*, with interest,—the defendant pleaded, that the note was made by the defendant as a collateral security for a debt due from one J. S. to the plaintiff; that the defendant was not, at the time of making the note, or ever, liable to pay the debt, or to give the note as a security for the same; and that there never was any other consideration for the making of the note, save as aforesaid:—Held, a sufficient plea of no consideration, after verdict. *Crofts v. Beale*, 172
2. To a count on a promissory note, the defendant pleaded that the note was given without consideration, and then went on to allege that it was obtained from him by the plaintiff upon a representation that he the defendant was indebted to the plaintiff in the sum mentioned in the note, whereas in truth and in fact no such sum of money, or any part thereof, was ever due from the defendant to the plaintiff:—Held, sufficient, without alleging

- that the representation was made *fraudulently*. *Southall v. Rigg*, 481
3. To a count upon a promissory note, the defendant pleaded “that he was indebted to one F. in the sum of 10*l.* 14*s.* 11*d.*, and no more; that the plaintiff *fraudulently, deceitfully*, and falsely represented to the defendant that there was due from the defendant to F. the sum of 32*l.* 6*s.* 10*d.*, and then demanded of, and by means of *such representation as aforesaid*, induced the defendant to deliver to him the note in the count mentioned.” It was proved, and found by the jury, that the note was obtained by a *false* representation by the plaintiff that 32*l.* 6*s.* 10*d.* was due, but that such representation had been made *without fraud*:—Held, that the evidence sustained the plea; for, that the words “*fraudulently and deceitfully*” might be rejected, and that the plea was in substance a plea of partial failure of consideration. *Forman v. Wright*, 481

II. DEBT.

Plea of Conditional Payment.

To debt on simple contract for goods sold and delivered, work and labour, &c., the defendant pleaded “as to 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof,” that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the plaintiff drew a bill on C. for 33*l.* 10*s.*, payable to the plaintiff’s order three months after date; that C. accepted the bill, and delivered it to the plaintiff, and the plaintiff received it, for and on account of the said sum of 33*l.* 10*s.*, parcel of the debt in the declaration mentioned, and the causes of action in respect thereof; and that the plaintiff endorsed and delivered the bill to one D., who was, before and at the time of the commencement of the suit, the holder of the bill, and entitled to sue C. thereon:—Held, that the giving of the bill by C. must be taken to be a conditional payment on behalf of the defendant; that the condition to defeat it not having happened, it operated as an absolute payment; and that it might be, and had been, adopted by the defendant in his plea, and consequently that it barred the action. *Belshaw v. Bush*, 191

III. COVENANT.

Traverse too large.—In covenant on an indenture of lease, the declaration alleged for breach, that the defendant, during the term by the indenture created, to wit, on such a day, and from thence continually for a long time, to wit, from thence hitherto, suffered the premises, and every part thereof, to be

endorsement of a memorandum containing the day of the date and return (?) of the first writ, required by the 10th section of the 2 W. 4, c. 39, was made upon the last writ before the service thereof upon the defendant.

Pritchard v. Bagshawe,

459

3. *Examined Copy of Roll.*]—An examined copy of the roll containing such endorsements, is not evidence of the fact: neither is the writ itself. *Id.*

4. *Endorsements on Intermediate Writs.*]—As to the time when, and the party by whom, the endorsements on the intermediate writs must be made—*quære.* *Id.*

SUBPŒNA.

Disobedience to—See ATTACHMENT, II.

TENDER.

Damages reduced by Plea of.

A plaintiff who recovers in an action of debt a sum which together with a sum paid into court on a plea of tender exceeds 20*l.*, is entitled to the costs of the action, notwithstanding the 11th section of the 13 & 14 Vict. c. 61. *Crosse v. Seaman,*

524

TIDE-WAITER.

See *Index to Registration Appeals*, I. 3,—*ante*, 1066.

TITLE-DEEDS.

See VENDOR AND PURCHASER.

TORT.

Effect of payment of Money into Court in an Action of—See PAYMENT INTO COURT, 3, 4, 5.

TRAVERSE.

Too large—See PLEADING, III.

TREASURY.

Commissioners of.

The commissioners of the treasury are not a corporation: *semble*, therefore, that the proper mode of serving them with process, would be, by delivering a copy to each of them. *Williams v. The Commissioners of the Admiralty,*

420

TRESPASS.

- I. *What a sufficient Possession to entitle a Party to maintain Trespass de Bonis asportatis.*

Where goods are assigned as security for an advance of money, upon trust to permit the assignor to remain in possession of them until default in payment at the time stipulated, and upon further trust to sell them upon such default being made,—the assignee has a sufficient possession to enable him to

maintain trespass against a wrongdoer.

White v. Morris,

1015

- II. *Justification by the sheriff or other officer.*

An assignment of goods as a security for an advance of money upon trust to permit the assignor to remain in possession of them until default in payment at the time stipulated, and upon further trust to sell them upon such default being made,—though void as against creditors, is good as between the parties, and as between either party and a stranger. And a bailiff of a county court claiming to seize goods on behalf of a judgment-creditor, is a stranger within that rule, unless he proves the legal authority under which he seized on behalf of such creditor, viz. the judgment. *White v. Morris,*

1015

In trespass against an execution-creditor and a bailiff of a county court for seizing goods under such circumstances, the plaintiff put in the warrant of execution, with the endorsement thereon by the officer that he had taken the goods under it:—Held, that the bailiff, as well as the execution-creditor, was bound to prove the judgment; and that the warrant, reciting the judgment (though put in by the plaintiff), was no evidence of such judgment. *Id.*

TROVER.

What amounts to a Conversion.

To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right. *Heald v. Carey,*

977

A. sent by railway from Paris seven cases of pictures, &c., addressed to "A., Custom-House, London Bridge, via Dunkirk, per steamer." Upon their arrival at Dunkirk, one of the packages was found to be damaged, and was, according to the course of proceedings in France, detained there for official examination: the remaining six being sent forward by B., the agent at Dunkirk of the railway company, and also of the steam shipping company, under a bill of lading making them deliverable "to Custom-House, London Bridge, or to order," upon payment of freight. These six cases duly arrived in London, and were received by A. The remaining case, having been examined and repacked, was forwarded by B. by another vessel belonging to the same company, under a bill of lading making it deliverable "to C., to hold at the disposal of A., Custom-House, London Bridge, or to his order," upon payment of freight. Both bills of lading contained a memorandum stating that the goods were to be taken out twenty-four hours after the steamboat was reported at the custom-house, or the same would be transhipped

V. *Particular Points.*

- Acquittal—ante, IV. 10.
 Aggravation—ante, IV. 9.
 Conditional payment—ante, II.
 Consideration, plea of want or failure of—
 ante, I.
 Conspiracy—ante, IV. 1, 2, 3.
 Damage, allegation of—ante, IV. 1, 2.
 Estoppel—ante, IV. 10.
 Fraud, plea of—ante, I. 2, 3.
 Insolvent act, plea of discharge under—see
 INSOLVENT DEBTOR, 1, 3.
 Libel, plea of justification—ante, 9, 10.
 New assignment—ante, IV. 5.
 Not guilty “by statute”—see COUNTY COURT,
 III. 2.
 Traverse too large—ante, III.
 Usury, plea of—see USURY.

PRACTICE.

I. *Process.*

1. *Service on a Lunatic.*]—A judge at chambers having made an order directing an appearance to be entered for a lunatic defendant, upon an affidavit of service of the writ of summons by leaving a copy with the keeper of an asylum in which the lunatic was confined, without a previous writ of *distringas*,—the court set aside the order. *Blake v. Cooper*, 680
2. *On Commissioners of the Admiralty.*]—The commissioners of the admiralty are not a corporation; *semble*, therefore, that the proper mode of serving them with process, would be, by delivering a copy to each of them. *Williams v. The Commissioners of the Admiralty*, 420
3. *Distringas.*]—The court granted a *distringas* to compel appearance, upon an affidavit showing the proper number of calls at the defendant's residence, the answers being that the defendant was ill and could not be seen, —without the usual statement of the deponent's belief that the defendant was keeping out of the way to avoid service. *Sheppard v. Williams*, 682
4. *Falsification of.*]—See ATTORNEY, III.

II. *Particulars, in Ejectment.*

The court will only under special circumstances grant an order for particulars of the premises sought to be recovered in an action of ejectment. *Doe d. Saxton v. Turner*, 896

III. *Judgment as in Case of a Nonsuit.*

Drawing up rule for—See REGULÆ GENERALES, II.

IV. *Delivery of Demurrer-Books.*

- 1 Where the plaintiff has, upon the defendant's default, in due time delivered the demurrer-books for him to the two junior judges, the defendant cannot be heard, but the plaintiff will have judgment, unless the defendant

appears and pays for the books so delivered for him. *Dorsett v. Aspdin*, 651

2. In this court, a previous notice of the plaintiff's intention to take the objection, is not required. *Id.*

V. *Payment of Money into Court.*

1. *In Indebitatus Assumpsit, or Debt.*]—Payment of money into court upon a *general count in indebitatus assumpsit*, or in *debt*, admits only a cause of action to the amount paid into court, and operates as an admission for no other purpose. *Perren v. The Monmouthshire Railway and Canal Company*, 855
2. *On a special Contract.*]—Payment of money into court upon a declaration on a *special contract*, admits the contract and the breach. *Id.*
3. *In Tort.*]—Payment of money into court in an action of tort, amounts to no more than an admission that the plaintiff has a *cause of action*, to the extent of the money paid in, from some wrongful act of the defendant, and does not necessarily admit that the latter is guilty of the wrongful act charged in the declaration. *Schreger v. Carden*, 851
4. Payment of money into court in actions of tort, may, according the form of the declaration, be subject either to the rule applicable to special contracts, or to the rule applicable to general indebitatus counts: thus, where the declaration is *general and unspecific*, the payment into court admits a *cause of action*, but not *the cause of action sued for*: on the other hand, if the declaration is *specific*, the payment into court admits the cause of action so specifically stated. *Perren v. The Monmouthshire Railway and Canal Company*, 855
5. In case against a railway company, for negligence, whereby the plaintiff, a passenger, was injured, the defendants pleaded payment into court of 25*l.*, and no damages *ultra*:—Held, that the payment into court admitted the contract to carry, and the breach of the duty founded upon that contract, so as to dispense with proof of negligence,—the damages being single, and depending upon nothing beyond the mere breach of duty admitted. *Id.*

VI. *Changing the Venue.*

It is no ground for changing the venue in an action for a libel contained in a letter written and sent to a person in the county to which the venue is sought to be changed, that the defendant (who has pleaded not guilty only) has many witnesses resident in that county, whom he intends to call in mitigation, and that the plaintiff has no witnesses in the county where the venue was originally laid. *Wheatcroft v. Mousley*, 677

VII. *Special Jury.*

1. Where the defendant has duly obtained a

has many witnesses resident in the county, whom he intends to call in mitigation, and that the plaintiff has no witnesses in the county where the venue was originally laid.
Wheatcroft v. Mousley, 677

VOLUNTARY CONVEYANCE.

1. A secret settlement made by a woman whilst under treaty of marriage, though liable to be set aside in a court of equity, is not necessarily void in a court of law. *Doe d. Richards v. Lewis. Richards v. Lewis,* 1035
2. A., pending a treaty of marriage between her and B., without B.'s knowledge, made a settlement of certain leaseholds, to herself for life, remainder to C., her son by a former marriage, remainder over to D.: Held, that this deed was not avoided by the marriage, under the statute 27 Eliz. c. 4,—the husband not taking as a purchaser. *Id.*
3. The deed (the execution of which did not appear to have been attested) was deposited by A. and C., shortly after its execution, with E., an attorney, with instructions to give it up only to those two together. After the death of A.'s husband, A. and C. went together to E., and got back the deed. A. died. In an ejectment brought by one claiming under C. against one claiming under a mortgage from A., it was proposed to give secondary evidence of the contents of this deed, upon proof that an unsuccessful search for it had been made at the house of A., and upon calling one of the two trustees named in it, who stated that he had never seen or heard of the deed:—Held, that, notwithstanding the circumstances under which it was executed, the deed might still be a valid deed; but that sufficient search had not been made to let in secondary evidence of its contents, inasmuch as no inquiry had been made as to the other trustee. *Id.*
4. A new trial, however, was granted, upon an affidavit of surprise in this respect. *Id.*
5. Held also, that declarations made by A. about the time of the supposed execution of the deed, to the effect that she had given the property to her son, reserving only a life-interest to herself,—were not admissible, as cutting down her interest. *Id.*

6. A voluntary settlement made after marriage, but without actual fraud, whereby a chattel interest of the wife's was conveyed in trust to the husband and wife for their joint lives and the life of the survivor, remainder to the wife's son by a former marriage, is not avoided under the statute 27 Eliz. c. 4, by a mortgage made by the wife after the death of her husband. *Doe d. Richards v. Lewis. Richards v. Lewis,* 1035

WARRANT.

See COUNTY COURT, III. 1.

WHEAT.

See CORN AVERAGE.

WILL.

Bequest of Annuity, with a Condition.

Testator bequeathed an annuity to his son A., payable quarterly, charging it upon his personal estate only, which, subject to the annuity, he bequeathed to his son B., whom he appointed his executor. The will proceeded,—"And I declare that the receipt of my said son A., signed with his own hand after each of the said quarterly payments shall have become due, shall be the only discharge which my executor shall be bound to accept, for each of such payments, and that it shall be lawful for my executor to require that my said son A. shall attend at the Town-Hall in Nottingham, to receive and give receipts for the said annuity, and to suspend the payment thereof until such requisition shall be complied with, from time to time, as my executor shall think proper:"—Held, that, assuming the condition to be a valid one, there was nothing to prevent A. from assigning the annuity to a third person. *Arden v. Goodacre,* 883

WITNESS.

Attachment against—See ATTACHMENT, II.

WRIT.

Falsification of—See ATTORNEY, III.

R. G. in the act of union mentioned, and Susannah his wife, conveyed to A. "all that the perpetual advowson, nomination, donation, or alternate right of presentation, and free disposition, of and to the vicarage of the parish church of Anwick aforesaid, and all other the manors or lordships, advowsons, impropriations, tenements, tithes, hereditaments, and parts and shares of manors or lordships, advowsons, &c., of them, the said R. G. and Susannah his wife, or either of them, situate and being in Anwick aforesaid."

The special verdict further found that the title of A. to the said moiety of the said advowson of the church of Brauncewell-with-Dunsby-and-Anwick, in the declaration mentioned, was derived in no other way than by that indenture:—

Held, that, by the act of union, a new presentative benefice was created, wholly separate and distinct from the former benefices; and that the patronage of this new presentative benefice was in the owners of the former advowsons in turn,—the advowsons remaining for this purpose unchanged in all their qualities, and transmissible as before. *Robinson v. The Marquis of Bristol* (in error), 241.

4. Held, also, that the right which R. G. had was well described in the declaration as a "moiety of the advowson of the church of Brauncewell-with-Dunsby-and-Anwick, as in gross by itself, as of fee and right;" and that such right was duly conveyed to A. by the deed of December, 1760; reversing the judgment of the Common Pleas. *Id.*

QUEEN'S CASE.

Rule in, as to the cross-examination of a witness touching the contents of a written document, —see EVIDENCE, IV.

QUEEN'S PRISON.

The court will take judicial notice that "the Queen's Prison,"—the prison of the court,—is in England. *Wickens v. Goatly*, 666

RAILWAY.

Covenants in Lease of—See COVENANT.

RAILWAY COMPANY.

I. Charges for Carriage of Goods.

1. By the 163d section of the act of incorporation (5 & 6 W. 4, c. cvii.) of the Great Western Railway Company, it was provided that all persons should have free liberty to use the railway, with carriages properly constructed, upon payment of such rates and tolls as the company should demand, not exceeding the rates or tolls by that act authorized. The 164th section empowered

the company to demand and receive for the tonnage of goods conveyed upon the railway certain rates or tolls,—the highest rate being 3d. per ton per mile. The 166th section authorized the company to provide locomotive or other power for drawing goods, &c., upon the railway, and to receive for the use of such engines or other power such sums as they should think proper, in addition to the rates or tolls authorized to be taken by the act. The 167th section empowered the company to employ engines and carriages for the conveyance of goods, &c., on the railway, and to make such reasonable charges for such conveyance as they might determine upon, in addition to the rates or tolls authorized by the act. And by the 1 Vict. c. xcii., s. 44, the company were empowered to demand and receive a reasonable charge "for the loading, unloading, or weighing any articles, matters, or things which they might be required to load, unload, or weigh:—Held, that the last-mentioned provision did not apply where the company, as carriers, undertook the conveyance of goods of other persons, but only where the duty of loading, unloading, &c., was performed by them at the request of persons supplying their own trucks; and, consequently, that they were not entitled to make a charge for "loading, unloading, &c.," in addition to the rates charged for carriage, where they acted as carriers under the 5 & 6 W. 4, c. cvii. s. 167; and that a party intrusting goods to them to be carried, and paying this charge in order to obtain the carriage and delivery of them, might recover back the amount in an action for money had and received. *Parker v. The Great Western Railway Company*, 545

2. By the 175th section of the 5 & 6 W. 4, c. cvii., it was enacted that the rates and tolls should be charged equally and after the same rate per ton per mile in respect of the same articles, and that no reduction or advance in the said rates and tolls should, either directly or indirectly, be made partially or in favour of or against any particular person or company, &c.; but that every such reduction or advance upon any particular kind or description of articles should take place throughout the whole of the railway upon and in respect of the same description of articles, and should extend to all persons using the same or carrying the same description of articles. By the 50th section of the 7 & 8 Vict. c. iii., the company were empowered, whenever they should act as carriers, or should provide locomotive or steam power or carriages for the conveyance of passengers, goods, &c., to charge for such locomotive or steam power and carriages such sum (not exceeding the sums limited by former acts), and that either per ton or per

mile, or by bulk, measure, number, or ad-measurement, or by fixed charges, as they should think expedient; provided, that, in whatever way the charges were made, they should be made *equally* to all passengers and to all persons in respect of all goods, &c., and *things of a like description and quality*, and conveyed in or propelled by a like carriage or engine passing only over the same portion of, and over the same distance along, the railway, and *under the like circumstances*; and that no reduction or advance in any of such charges should be made partially, either directly or indirectly, in favour of or against any particular company or person. The company required carriers who brought goods to them for conveyance on the railway, to deliver with them a printed note filled up with the description, contents, and weight of the several packages to be carried, *without which the company refused to receive them*. In consideration of this additional trouble, the company formerly allowed the carriers a discount of 10 per cent. on the sums paid by them for carriage:—Held that the discontinuance of this allowance did not constitute an inequality of charge, as between carriers and the rest of the public, so as to give the carrier a claim for money had and received—whatever other remedy he might have against the company. *Parker v. The Great Western Railway Company*, 545

3. The company had entered into an agreement with one Sherman, a carrier, to collect and deliver parcels for them in London, for which service they paid him 1000*l.* per annum, he on his part relinquishing the customary carrier's charge for "booking":—Held, that this did not constitute an inequality of charge, within the 5 & 6 W. 4, c. cvii. s. 175. *Id.*
4. By the 171st section of the 5 & 6 W. 4, c. cvii., the company were empowered to fix the sum to be charged by them in respect of small parcels (not exceeding 500*lbs.* weight) as to them should seem proper: "provided always "that that provision should not extend to articles sent in *large aggregate quantities*, although made up of separate and distinct parcels, such as, bags of sugar, coffee, meal, and the like, but only to *single parcels unconnected with parcels of a like nature*, which might be sent upon the railway at the same time." The company had, during the period embraced by this action, issued three printed bills of charges, called "scale-bills," the first and third of which contained four, and the second five classifications of goods,—and at the end an intimation that "packed parcels" would be charged by the company 50 per cent. in addition to the highest class, that is, the fourth class in the first and third, and the fifth class in the second scale-bill.

This additional charge of 50 per cent. was imposed upon the plaintiff and other carriers only, and not upon the public:—Held, a violation of the equality clauses,—5 & 6 W. 4, c. cvii., s. 175, and 7 & 8 Vict. c. iii., s. 50; and that the plaintiff was entitled to recover back the overcharge. *Parker v. The Great Western Railway Company*, 545

5. According to the company's scale-bills, all packages of *less* than a given weight were to be charged, in their respective class, according to the "parcel-rate," and all *above* that weight, in their respective class, according to the "tonnage-rate." The company did not treat carriers as consignor and consignee of the goods carried for them, for the purpose of calculating the charge to be made for their carriage; but they adopted the following system:—When several packages of goods of *different descriptions*, but of *one class*, appeared to be intended for the same ultimate consignee, all such goods were lumped together, and charged at one gross weight, so as to bring them into the "tonnage-rate," although severally the packages might be of such weight as would have brought them into the "parcel-rate;" but, if such goods, though in the same class, were not intended for the same ultimate consignee, each package or number of packages going to each ultimate consignee was charged separately, and according to the "tonnage" or "parcel-rate," according as the weight was above or below the dividing point between the one rate and the other:—Held, that this was an inequality of charge, within the 5 & 6 W. 4, c. cvii. s. 171; and that the fact of the plaintiff's being a carrier, and not the ultimate consignee of the goods, did not show that the goods were not carried "under the same circumstances," within the meaning of the proviso in the 7 & 8 Vict. c. iii., s. 50. *Id.*
6. By the first scale-bill, the company intimated, that, on "miscellaneous goods, not being aggregate of one *kind* or *class*," an additional charge of 2*d.* per package or article, up to 2 cwt., would be made. On some occasions, when packages sent by the plaintiff, in manner before mentioned, contained goods of one *class*, and each package was of a weight less than the limited weight for the "parcel-rate," and was intended for a different ultimate consignee, but the several packages together exceeded the limit, the company charged them as "miscellaneous goods," on which, in addition to the higher rate of charge, this further charge of 2*d.* per package was imposed:—Held, that the words "kind" and "class" being used synonymously, this additional charge was, under the circumstances, unjustifiable. *Id.*
7. Assuming (as the arbitrator by whom the

case was stated, had found) that the company were entitled, under the 50th section of the 7 & 8 Vict. c. iii.,—in addition to the rate of 3d. per ton per mile which they are authorized to charge by the 5 & 6 W. 4, c. cvii., s. 164,—to charge for locomotive or steam power; and for carriages, such sum as they think expedient:—Held, that the company are not bound in their charge specifically to demand so much per ton under the 5 & 6 W. 4, c. cvii., s. 164, and so much per mile for the use of the locomotive power and carriages under the 7 & 8 Vict. c. iii. s. 50; but that they are entitled to charge, as carriers, for the conveyance (including loading, unloading, &c.) of the goods, under the 5 & 6 W. 4, c. cvii. s. 167, a *reasonable sum* beyond such tonnage and mileage. *Parker v. The Great Western Railway Company*, 545

8. Where the carrier has collected from several original consignors several parcels intended for several ultimate consignees, the whole of which together do not in weight exceed the dividing point between "parcel" and "tonnage" rates, according to the scale-bill, and do not amount to 500lbs. in weight, and has delivered them to, and received them from, the company in one lot,—Held, that, if the nature of the parcels be such that the company are entitled to charge them to the public at the "parcel-rate," under the 171st section of the 5 & 6 W. 4, c. cvii., the fact of the contents being goods of the same "class" in the scale-bill, for a different purpose, does not disentitle the company so to charge them to the carrier. *Id.*

9. The Great Western Railway Company, by its act of incorporation, 5 & 6 W. 4, c. cvii., was empowered to charge certain rates and tolls for the use of their railway and the carriage of passengers and goods thereon. By a subsequent act, 2 Vict. c. xxvii., s. 24, it was provided that those rates and tolls should be at all times charged *equally* to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, &c., of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line; and that no reduction or advance should be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the same portion of the railway. By the 7 & 8 Vict. c. iii., s. 48, the last-mentioned provision was repealed, and in terms re-enacted by s. 49; and by s. 50, it was enacted that it should be lawful for the company, whenever they should act as carriers, or should provide power or carriages for the conveyance of passengers, goods, &c., to charge for such power and carriages such sum (not exceeding certain

limits), and that either per ton, or per mile or by bulk, measure, number, or admeasurement, or by fixed charges, as they should think expedient: provided, that, in whatever way the charges were made, they should be made *equally* to all passengers, and to all persons, in respect of all goods, &c., of a like description and quality, and conveyed in or propelled by a like carriage or engine, passing only over the same portion of, and over the same distance along, the railway, *and under the like circumstances*; and that no reduction or advance in any of such charges should be made partially, either directly or indirectly, in favour of or against any particular company or person:—Held, that the fact of the person sending the goods to be conveyed along the railway being a carrier, did not constitute such a dissimilarity of circumstances, as to justify a difference of charge as between him and the rest of the public. *Edwards v. The Great Western Railway Company*, 588

10. By the 171st section of the 5 & 6 W. 4, c. cvii., the company were authorized to fix the sum to be charged in respect of *small parcels* (not exceeding 500lbs. weight) as to them should seem proper; provided, that that provision should not extend to articles, matters, or things sent in *large aggregate quantities*, although made up of separate and distinct parcels, such as, bags of sugar, coffee, &c., but only to *single parcels*, unconnected with *parcels of a like nature*, which might be sent upon the railway at the same time. The company issued "scale-bills," specifying in classes the charges to be made for carriage,—each class containing various kinds of goods; and at the end a "miscellaneous class," comprising goods "not being aggregate of one class or kind," for which a higher tonnage-rate was exacted, and also an additional charge of 2d. per package:—Held, that the company were not justified in charging under the "miscellaneous class" goods which were aggregate of several kinds, but all contained in one class. *Id.*

11. Held also, that the carrier who brought the goods to, and received them from the company at the end of the journey, was to be treated as the consignee, without reference to the ultimate destination of the goods. *Id.*

12. Held also, that the carrier was not entitled to any allowance in respect of assistance in the loading, unloading, or weighing, given by his men to the company, voluntarily, or for the carrier's own convenience. *Id.*

13. The company being under an agreement with one Kent to make him an allowance of 10 per cent. upon the sums paid by him for carriage of goods, in consideration of services rendered by him, and having discon-

tinued that allowance in consequence of a former decision of this court, Kent sued them for their breach of contract, and they compromised that action and paid him 500*l.* to cancel the agreement:—Held, that this did not constitute an inequality of charge as between Kent and other carriers. *Edwards v. The Great Western Railway Company*, 588

14. The plaintiff having, after notice of action, served the company with a written demand of interest under the statute 3 & 4 W. 4, c. 42, s. 28:—Held, that the arbitrator, under a submission of “all matters in difference,” might award the plaintiff interest, notwithstanding the notice of action did not contain a demand of interest; and, further, that, assuming a notice of action to have been necessary, the want or insufficiency of such notice could not be taken advantage of, since the 5 & 6 Vict. c. 97, s. 3, unless pleaded specially. *Id.*

II. Action against, for Negligence.

1. In case against a railway company, for negligence, whereby the plaintiff, a passenger, was injured, the defendants pleaded payment into court of 25*l.*, and no damages *ultra*:—Held, that the payment into court admitted the contract to carry, and the breach of the duty founded upon that contract, so as to dispense with proof of negligence,—the damages being single, and depending upon nothing beyond the mere breach of duty admitted. *Perren v. The Monmouthshire Railway and Canal Company*, 855

2. A declaration in case against a railway company for the loss of a passenger's luggage, stated that the defendants received the passenger to be safely carried, together with his luggage, “for reward to the defendants in that behalf;” it then alleged that it was the defendant's duty safely and securely to carry the plaintiff and his luggage, and averred a breach of that duty, whereby the luggage was lost:—Held, that the action being founded on the breach of duty, and not on contract, it was not necessary to allege or to prove that the reward was to be paid by the plaintiff; but that the plaintiff was entitled to recover, although it appeared that the fare was paid by the plaintiff's master, with whom he was travelling at the time. *Marshall v. The York, Newcastle, and Berwick Railway Company*, 655

3. And, *semble*, that if the allegation in the declaration did import that the payment was to be made by the plaintiff, the payment by his master on his behalf would be a payment by the plaintiff. *Id.*

III. Assessment of Damages under 8 & 9 Vict. c. 18, s. 68.

Costs of Inquiry.—A party whose land has

been “damaged or injuriously affected” by the execution of the works of a railway company, and who, in a proceeding initiated by himself under the 68th section of the lands clauses consolidation act, 8 & 9 Vict. c. 18, recovers by the verdict of a jury a larger sum than that tendered by the company, is entitled to the costs of the inquiry before the sheriff,—the earlier provisions of the statute as to the manner of assessing compensation, being virtually incorporated in that section. *Richardson v. The South-Eastern Railway Company*, 154

IV. Misapplication of Funds of.

1. A railway company incorporated by act of parliament, cannot, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion of its funds to purposes foreign from those for which it is incorporated. *The East Anglian Railways Company v. The Eastern Counties Railway Company*, 775
2. The defendants were incorporated by an act of parliament, the 1st section of which enacted that certain persons should be united into a company for making and maintaining a certain railway and other works by the act authorized, according to the provisions and regulations thereafter mentioned, and for that purpose should be one body corporate by the name and style of “The Eastern Counties Railway Company,” and should have perpetual succession, and a common seal. The 3d section empowered the company to raise a sum of money “for making and maintaining the said railway, and other works authorized by the act.” The 5th section directed that the money so raised should be expended in and towards making and maintaining the said railway and other works, and in otherwise carrying the act into execution. And by subsequent sections it was provided that the profits, after defraying the expenses of making, maintaining, and working the railway, were to be accounted for and divided amongst the proprietors of the undertaking:—Held, that it was not competent to the directors to enter into a contract with another railway company, to take a lease of their line, and to pay the costs incurred by them in the soliciting and promoting of bills in parliament for the extension and improvement of such other line of railway,—even though such extension and improvement would benefit their own company; and that such contract, if entered into, was illegal and void, and could not be enforced in a court of law. *Id.*

V. Contracts by, Construction of.

See CONTRACT.

COVENANT.

RAILWAY SHARES.

Differences on—See GAMING.

RECORDS.

I. *Production and Proof of—See REGULÆ GENERALES, I.*II. *Of Proceedings in the County Court—See COUNTY COURT, III. 3.*

REGULÆ GENERALES.

I. *Production and Proof of Records.*

"The judges, on the 13th of January, in the present year, referred to us [ERLE, J., PLATT, B., and TALFOURD, J.] to consider and report what are the proper regulations to be made as to the production and proof of records. We recommend that no order of a court or a judge for the issuing a *subpœna duces tecum*, where an original record is required, be made, unless the court or judge be satisfied that there is good reason for requiring the original record; and that no such *subpœna* be issued, until such order has been produced to the officer issuing the same, and filed with him, and until the writ has been made conformable to the description of the document contained in such order." [Signed by ERLE, J., PLATT, B., and TALFOURD, J., in Trinity Vacation, 1851, and confirmed by the judges in Michaelmas Term, 1851.] 814

II. *Drawing up Rule for Judgment as in Case of a Nonsuit.*

"It is ordered, that, where a rule for judgment as in case of a nonsuit shall have been discharged on a peremptory undertaking to try at the next or any future assizes or sittings, if the plaintiff shall make default in proceeding to trial pursuant to his undertaking, the defendant shall be at liberty, if the plaintiff has not drawn up the rule, to draw it up at any time before moving for judgment, and thereupon to move for judgment, without serving a copy of the rule on the plaintiff." *Easter, 1849.* 49

III. *Mileage.*

"At a meeting of the judges held at Serjeants' Inn on April the 16th, 1849, it was unanimously resolved, that, in all cases, mileage shall be allowed to an attorney attending an assize town, whatever the number of causes may be in which he is engaged, and that the charge in respect thereof shall be equally apportioned to each cause." *Easter, 1849.* 50

RELEASE.

Obtained by Fraud.

On the morning of the trial of a plaint in the county court at the suit of several parties, the clerk of the defendant's attorney went to one of the plaintiffs, an illiterate person, and obtain-

ed his "mark" to a peculiarly-worded release. The judge of the county court, observing that the release was evidently a trick, gave judgment for the plaintiffs:—Held, that the circumstances under which the release was obtained, afforded some evidence of fraud, so as to justify the judge in declining to give effect to it. *Surgent, app., Wedlake, resp., 732*

RENT.

Computation of—See LEASE, I.

RULE.

Service of.—Service of a rule upon "a female servant at the lodgings of the defendant" is not good service. *Price v. Thomas,* 543
Enlargement of.—An expired rule cannot be enlarged. *Id.*

SALVAGE.

See INSURANCE, II. 3.

SET-OFF.

Of Interlocutory Costs—See COSTS, IV.

SHARES.

Differences on—See GAMING.
And see JOINT-STOCK BANK.

SHERIFF.

I. *Attachment for on Escape on ca. sa.*

Terms of setting aside.—The discretion of the court, on setting aside an attachment against the sheriff for the escape of a prisoner taken on a *ca. sa.*, is to be governed by the principle laid down in an action for damages under the 5 & 6 Vict. c. 98, s. 31; and, if, necessary, an action will be directed, to ascertain the amount of such damages. *The Queen v. The Sheriff of Leicestershire,* 367

II. *Action for an Escape.**Measure of Damages in an Action on the Case.*

—The true measure of damages in an action on the case against the sheriff, under the 5 & 6 Vict. c. 98, s. 31, for the escape of a prisoner taken on a *ca. sa.*, is, "the value of the custody of the debtor at the moment of the escape; and no deduction is to be made on account of anything which the plaintiff might have obtained by diligence after the escape:" but, if the plaintiff has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from retaking the debtor, the damages will be materially affected by such conduct. *Arden v. Goodacre,* 371

III. *Officers' Fees.*

Upon a levy of debt and costs under a *f. fa.*, the officer is not entitled to charge a fee for "search" or "discharge." *Masters v. Lowther,* 943

IV. *Justification of Seizure under Process—*
See TRESPASS.

SHIPPING.

Authority of the Master.

Hypothecation.]—The Master of a vessel has no authority to hypothecate for money borrowed at a foreign port for necessary repairs and disbursements, and at the same time pledge the personal credit of his owner for such advances,—whether maritime interest be stipulated for or not. *Stainbank v. Fenning*, 51

And see INSURANCE.

SPECIAL CONTRACT.

*Effect of Payment of Money into Court in an Action upon,—*See PAYMENT INTO COURT, 2.

SPECIAL JURY.

1. Where a rule for a special jury has been obtained at the instance of the defendant, who has nominated but not reduced the jury, the proper course for the plaintiff to pursue, is, to proceed to reduce, and not to move to set aside the rule. *White v. The Eastern Union Railway Company*, 875
2. Where the defendant has duly obtained a rule for a special jury, and the jury has been struck and reduced, it is not competent to the court to direct that the cause be tried by a common jury, on the defendant's failure to summon a special jury. *Newman v. Graham*, 153

STATUTE.

Rule of Construction.

Where a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application. *Macdougall v. Paterson*, 755

STATUTE OF FRAUDS.

Promise by Executor.

Negotiations being pending between the plaintiffs, as mortgagees, and the defendant (who was the son and executor of the mortgagor), relative to the paying off the mortgage, A., one of the mortgagees (acting as their solicitor), on the 7th of December, 1848, wrote to the defendant thus,—“I fear you will not be prepared to pay off the mortgage, as arranged, on the 1st of January next. If this should be so, I can give further time for payment of the mortgage until the 1st of July next, provided the amount is reduced by the 25th of March next to 1500*l.*”

In answer to this, the defendant wrote to A., on the 18th of December,—“I have well

considered what you propose, and, if I could meet it, and thus reduce the mortgage to the sum you mention, it would be the best thing for the estate. I cannot at present raise so large an amount: but I shall be enabled gradually to accomplish what you wish, no doubt: and, if you can give me about a year, it will be most beneficial to me, as well as safer for your client. I can put my hand at this moment upon 100*l.*, which I will pay over to you, and will engage by the beginning of April next to have another 100*l.* ready for you, and other sums afterwards, if in the mean time, I should be so unfortunate as neither to be able to transfer the mortgage nor sell the property. If you will allow me as long a time as you can, it will be of very great service to me, and I shall be much indebted to you.”

To this, A., on the 3d of January, 1849, replied,—“I will consider that 200*l.* will be paid by you on the 1st of April; but I cannot say that further time will be given, unless the amount is made up 1500*l.*; and must therefore ask you to effect this by the time named.”

The 200*l.* was not paid; and, in answer to pressing applications on the part of A., the defendant, on the 9th of April, wrote,—“I much regret that I was not enabled to pay the 200*l.* into your account by the time agreed upon;” and again, on the 25th,—“I regret much that I was unable to send you the money by the time you had fixed upon:”—

Held (MAULE, J., dissentiente), that the letter of the 18th of December, 1848, and the subsequent correspondence, did not amount to a promise to pay 200*l.*, on the 1st of April, in consideration of forbearance until that time, so as to satisfy the statute of frauds; the earlier part of that letter (which MAULE, J., considered to be separable from the rest, and to amount to a distinct and independent promise to pay the 200*l.* on that day, in consideration of such forbearance), forming only part of a proposal for a longer period of forbearance, which proposal was not accepted by A.'s letter of the 3d of January, 1849. *Hamilton v. Terry*, 954

STATUTE OF LIMITATIONS.

Process to prevent the Operation of.

1. *Nisi Prius Record.*]—The nisi prius record, showing that the writ of summons issued within six years of the accrual of the cause of action, is not conclusive evidence to prevent the operation of the statute of limitations. Whether it is even *prima facie* evidence for that purpose,—*quære*. *Pritchard v. Bageshawe*, 459
2. *Endorsements.*]—Where the writ of summons has been continued by *alias* and *pluries*, in order to prevent the operation of the statute, it is necessary for the plaintiff to show that the

